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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 1404

WILSON AMES,
Plaintiff in Error,

vs.

OBERT MOIR, JOHN C. NICOL AND JAMES PETERSON, LATE PARTNERS AS ROBERT MOIR & COMPANY,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

NOTE: This Record, as printed, has been done by agreement of the Attorneys for the respective parties.

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STATE OF ILLINOIS,
1 SUPREME COURT,
NORTHERN GRAND DIVISION.

At a Supreme Court begun and held at Ottawa, on Tuesday, the fifth day of March, in the year of our Lord one thousand eight hundred and eighty-nine, within and for the Northern Grand Division of the State of Illinois.

Present:

ALFRED M. CRAIG, *Chief Justice.*
JOHN SCHOLFIELD, *Justice.*
BENJ. D. MAGRUDER, *Justice.*
DAVID J. BAKER, *Justice.*
SIMEON P. SHOPE, *Justice.*
JOSEPH M. BAILEY, *Justice.*
JACOB W. WILKIN, *Justice.*
GEOROE HUNT, *Attorney General.*
LAWRENCE MORRISSEY, *Sheriff.*
ALFRED H. TAYLOR, *Clerk.*

BE IT REMEMBERED, That afterwards, to wit: On the 6th day of March, A. D. 1889, there was filed in the office of the clerk of said court, a certain certified transcript of the record and proccedings of the Superior court of Cook county, Illinois, also a certified transcript of the record and proceedings of the Appellate court of Illinois, First district, which said transcripts are in the words and figures following, viz:

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
2 COUNTY OF COOK. } ss.

Pleas, before the Honorable Kirk Hawes, one of the Judges of the Superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said Superior court of Cook county, begun and holden at the court house, in the city of Chicago, in said county and state, on the first Monday, being the sixth day of June, in the year of our Lord one thousand

eight hundred and eighty-seven, and of the independence of the United States of America, the one hundred and eleventh.

Present: The Honorable Kirk Hawes,
Judge of the Superior Court of Cook County.
Julius S. Grinnell, *State's Attorney.* Canute R. Matson, *Sheriff of Cook County.*
Attest: Patrick McGrath, *Clerk.*

Be it remembered that heretofore, to wit: On the 13th day of June in the year of our Lord, one thousand eight hundred and eighty-six Robert Moir *et al.*, plaintiffs, by John B. Hawley, their attorney, filed in the office of the clerk of the Superior court of Cook county their praecipe for summons which is in the words and figures as follows, to wit:

State of Illinois, } ss.
County of Cook. }

Superior Court of Cook County, January Term, A. D. 1886.

Robert Moir, John C. Nichol and James Peterson, late partners under the firm name and style of Robert Moir & Co., *Plaintiffs,*
vs.
Wilson Ames, *Defendant.*
3
Assumpsit.
Damages $20,000.

The clerk of said court will issue a summons in the above entitled cause to said defendant in a plea of trespass on the case upon promises to the damage of said plaintiffs, in the sum of twenty thousand dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the March term of said court, A. D. 1886.

John B. Hawley, *Plaintiff's Attorney.*

To Patrick McGrath, Esq., clerk, Chicago, January 13, 1886.

And on the day and year last aforesaid, to wit: January 13, A. D. 1886, there issued out of the office of the clerk of said court The People's Writ of Summons, which said writ with the return of the sheriff thereon endorsed in the words and figures as follows:

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

THE PEOPLE OF THE STATE OF ILLINIOIS.

To the Sheriff of said County, Greeting:

4 We command you that you summon Wilson Ames, if he shall be found in your county, personally to be and to appear before the Superior court of Cook county, on the first day of the term thereof, to be holden at the Court House, in the city of Chicago, in said Cook county, on the first Monday of March next, to answer unto Robert Moir, John C. Nicol and James Peterson, late partners under the firm name and style of Robert Moir & Co. in a plea of trespass on the case upon promises, to the damage of said plaintiffs, as it is said, in the sum of twenty thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, Patrick McGrath, clerk of our said court, and the seal thereof, at Chicago, aforesaid, this 13th day of January, A. D. 1886.

PATRICK MCGRATH, *Clerk.*

[SEAL.]

ENDORSEMENT.

Pd. 75.

Served this writ on the within named defendant Wilson Ames by reading the same to him the 22d day of January 1886.

SETH F. HANCHETT, *Sheriff.*
By EMIL DIETZSCH, *Deputy.*

And afterwards, to wit, on February 19th, A. D. 1886, there was filed in the office of the clerk of said court a certain declaration which is in the words and figures as follows, to wit:

5 STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE SUPERIOR COURT OF SAID COUNTY, MARCH TERM, A. D. 1886.

Robert Moir, John C. Nicol and James Peterson, late partners in business under the name and style of Robert Moir & Company, plaintiffs in this suit, by John B. Hawley, their attorney, complain of Wilson Ames, defendant in this suit, in a plea of trespass on the

case upon promises; for that, whereas, the defendant, heretofore, to wit: on the ninth day of June, A. D. 1870, at Chicago, to wit: in the county aforesaid, made and executed his certain instrument in writing, bearing date the day and year aforesaid, and then and there delivered the same to the plaintiffs, wherein it was expressed and provided that the defendant had on that day bought of said plaintiffs, by the name of Robert Moir & Company, one hundred barrels of high-wines "Iron-bound," at one dollar and seven cents per proof gallon.

It was further provided therein that the conditions of the sale were as follows: The buyer could call from the first of July thereafter to the twentieth of the same month by giving three days notice, and if not called for by the twentieth of July, the seller had the privilege of delivering up to the end of the same month by giving three days notice, said high-wines to be delivered in fifty barrel lots; and it was further provided therein that to insure the fulfillment of said contract, a margin of three hundred dollars should be put up by both parties; and the plaintiffs further aver, that in conformity with the provisions of said writing or agreement, each
6 party then and there, to wit: at the time of the making thereof, put up a margin of three hundred dollars.

That after the making and delivery of said writing or agreement, and the putting up of said margins, as aforesaid, to wit: on the fifteenth day of July, A. D. 1870, said defendant made a call upon the plaintiffs under said writing or agreement, for the delivery by the plaintiffs to the defendant of one hundred barrels of high-wines three days thereafter, to wit: on the eighteenth day of said July, under said writing or agreement, and that afterwards and before the twentieth day of July, A. D. 1870, to wit: on the eighteenth day of said July, to wit: at the county aforesaid, the plaintiffs delivered to the defendant, under said writing or agreement, and to fill and comply with said call of one hundred barrels of high-wines, which said high-wines were then and there accepted and received by said defendant under said writing or agreement. And the plaintiffs further aver that upon the delivery of said high-wines to the defendant as aforesaid, it became and was his duty then and there to pay to the plaintiffs the said price and value of said high-wines, as aforesaid, amounting to a large sum of money, to wit: the sum of eight thousand dollars. But the defendant not regarding his duty in that behalf, though often requested by the plaintiffs, did not then nor has he hitherto paid said sum of money, or any part thereof, though he has often promised the plaintiffs so to do, to wit: at the county aforesaid.

2D COUNT.

And also for that, whereas the defendant heretofore, to wit: on the ninth day of June, A. D. 1870, at Chicago, to wit: at the county aforesaid, made his certain instrument in writing in the words and figures as follows, to wit:

7 "CONTRACT.

"CHICAGO, June 9, 1870.

"I have this day bought of Robert Moir & Co., one hundred (100) barrels highwines 'iron bound,' at one dollar seven cents ($1.07) per proof gallon. The conditions of sale are as follows: The buyer can call from 1st July to 20th of same month by giving three days notice, and if not called for by the 20th July, the seller has the privilege of delivering up to the end of July by giving three days notice; to be delivered in fifty barrel lots. To insure the fulfillment of this contract, a margin of three hundred dollars will be put up by both parties.

"WILSON AMES."

5 cent U. S. Int. Revenue Stamp. } Canceled.

And the defendant then and there delivered said last mentioned writing or agreement to the plaintiffs, and each party then and there put up a margin of three hundred dollars as therein provided. That afterwards, to wit: on the fifteenth day of July, A. D. 1870, said defendant made his call upon the plaintiffs to deliver to the defendant one hundred barrels of highwines on, to wit: the eighteenth of said July, under said last mentioned writing or agreement, and that in pursuance thereof the plaintiffs afterwards, to wit: on the eighteenth day of said July, and before the twentieth day of July, A. D. 1870, to wit: at the county aforesaid, delivered to the defendant under said writing or agreement one hundred barrels of highwines, which were then and there accepted by the defendant under said writing or agreement. And the plaintiffs further
8 aver that upon the delivery of said last mentioned highwines to the defendant as aforesaid, it became and was his duty then and there to pay to the plaintiffs the said price and value of said last mentioned highwines as aforesaid, amounting to a large sum of money, to wit: the sum of eight thousand dollars. But the defendant not regarding his duty in that behalf, though often requested by the plaintiffs, did not then nor has he hitherto paid said last

mentioned sum of money or any part thereof, though he has often promised the plaintiffs so to do, to wit: at the county aforesaid.

Nor hath the defendant paid to the plaintiffs any of the said sums of money or any or either or any part thereof, but to pay the same or any part thereof hath hitherto wholly refused, and still doth refuse, to the damage of the plaintiffs of twenty thousand dollars, and therefore they bring their suit, &c.

JOHN B. HAWLEY,
Atty. for Pltffs.

STATE OF ILLINOIS, } ss. IN THE SUPERIOR COURT.
COUNTY OF COOK. }

Robert Moir *et al.* }
vs. }
Wilson Ames. }

The following is a copy of the written instrument sued upon:

CONTRACT.

"CHICAGO, June 9, 1870.

"I have this day bought of Robert Moir & Co., one hundred (100) barrels highwines 'iron bound,' at one dollar seven cents
9 ($1.07) per proof gallon. The conditions of sale are as follows: The buyer can call from 1st July to 20th of same month by giving three days notice, and if not called for by the 20th July the seller has the privilege of delivering up to the end of July by giving three days notice. To be delivered in fifty barrel lots. To insure the fulfillment of this contract a margin of three hundred dollars will be put up by both parties.

"WILSON AMES."

5 cent U. S. Int. Revenue Stamp. } Canceled.

And afterwards, to wit: on the first day of March, A. D. 1886, there was filed in the office of the clerk of said court a certain plea which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

IN THE SUPERIOR COURT OF COOK COUNTY OF THE MARCH TERM, A. D. 1886.

Robert Moir, John C. Nicol and James Peterson, late partners, under name of Robert Moir & Co., *vs.* Wilson Ames. } 100,894. *Assumpsit.*

10 And the defendant, by John G. Reid, his attorney, comes and defends the wrong and injury, when etc., and says that he did not promise in manner and form as the plaintiffs have above thereof complained against him, and of this he puts himself upon the country, etc.

By JOHN G. REID,
Atty. for Deft.

And the plaintiffs do the like.

EDSALL & EDSALL,
Attys. for Plffs.

And afterwards, to wit: on the 25th day of September, A. D. 1886, the same being one of the days of the days of the September term of said court, the following, among other proceedings, were had in said court and entered of record, to wit:

Robert Moir *et al.* *vs.* Wilson Ames. } 100,894. *Assumpsit.*

On motion of defendant's attorney it is ordered that leave be and is hereby given the defendant to file special pleas instanter.

And on the day and year last aforesaid, to wit: September, A. D. 1886, there was filed in the office of the clerk of said court certain special pleas, which said pleas are as follows, to wit:

11 IN THE SUPERIOR COURT OF COOK COUNTY, OF THE SEPTEMBER TERM, A. D. 1886.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

Robert Moir, John C. Nicol and James Peterson, late partners as Robert Moir & Co.,
vs.
Wilson Ames.

Assumpsit.
General No. 100,894.

(2) Now comes the said defendant, and leave of court being first had and obtained, for further plea in this behalf says, that the said plaintiffs ought not to have their aforesaid action against him, the defendant, because he says that after the making of the several supposed promises in the said declaration mentioned, and before the commencement of this suit, to wit: on the thirteenth day of September, A. D. 1872, the District Court of the United States for the Northern district of New York, a court having jurisdiction of the person of this defendant, and of the mattters hereinafter mentioned, granted to this defendant a certain discharge in these words and figures, to wit:

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

In the matter of Wilson Ames, a bankrupt. } *In Bankruptcy No. 3,405.*

12 WHEREAS, Wilson Ames, of Saratoga Springs, in the County of Saratoga, and State of New York, has been duly adjudged a bankrupt under the Act of Congress, establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the Court, that said Wilson Ames be forever discharged from all debts and claims which by said Act are made provable against his estate, and which existed on the 28th day of March, 1872, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said Act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the Court at Buffalo, in the said District, this 13th day of September, A. D. 1872.

N. K. HALL, *Judge.*

Attest:

M. P. FILLMORE, *Clerk.*

[SEAL OF COURT.]

And the defendant further says, that the several supposed causes of action in the said declaration mentioned, are in respect of debts and claims, and each of them is in respect of a debt and claim, by the said Act of Congress made provable against the estate of the defendant, and which existed on the 28th day of March, 1872, and that the said supposed causes of action are not, nor are any, nor is any one of them, in respect of any such debts or debt as are or is by the said Act excepted from the operation of a discharge in bankruptcy; and this, the defendant is ready to verify; wherefore he prays judgment, etc.

(3.) And for a further plea in this behalf, the defendant says
13 that the plaintiffs ought not to have their aforesaid action against him, because he says that after the making of the several supposed promises, to wit: the supposed instruments in writing in the several counts of the declaration mentioned, and before the commencement of this suit, to wit: on the 13th day of September, A. D. 1872, it was ordered, adjudged and decreed by the District court of the United States for the Northern district of New York, that this defendant be forever discharged from all debts and claims, which under the act of the Congress of the United States, entitled "an Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, are made provable against his estate, and which existed on the 28th day of March, 1872; that on said day and in pursuance of said order or decree, and in accordance with the provisions of said act of Congress, a certificate of such discharge, under the seal of said court, attested by the clerk and signed by the judge thereof, was duly issued to this defendant.

And this defendant says the said court had jurisdiction of the said proceeding in bankruptcy, and that the several supposed causes of action in the several counts of the declaration mentioned, were, and each was, in existence, if at all, on and prior to the 28th day of March, A. D. 1872, and the same were, and each was, of the nature and character that was provable against his estate under, and in accordance with the provisions of said act of Congress, and not one of them, is in respect of any such debts or debt, as are or is excepted by said act, from the operation of a discharge in bank-

ruptcy. And this the defendant is ready to verify; wherefore he prays judgment, etc.

* * * * *

And afterwards, to wit: on the 28th day of January, A. D.
19 1887, there was filed in the office of the clerk of said court certain replications which are in the words and figures, as follows, to wit:

IN THE SUPERIOR COURT OF COOK COUNTY.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Robert Moir, John C. Nichol and James Peterson, partners, etc., *vs.* Wilson Ames. } *Assumpsit.*

1ST. REP. TO 2D AND 3D PLEAS.

And now come the plaintiffs by Edsall & Edsall, their attorneys, and for replication to the pleas of the defendant secondly and
20 thirdly above pleaded, wherein the defendant sets up his alleged discharge in bankruptcy, and as to each of said pleas severally, the plaintiffs say *precludi non*, because they say that there is not any record of the said supposed discharge in bankruptcy, remaining in said district court of the United States, in manner and form as the defendant hath above in his second and third pleas in that behalf alleged, and this the plaintiff is ready to verify by the record, etc.

2D REP. TO 2D AND 3D PLEAS.

And for further replication in this behalf as to each of said pleas secondly and thirdly above pleaded, the plaintiffs, by leave of court first had and obtained, say *precludi non*, etc., because they say that the said debt in the plaintiff's declaration mentioned, and sought to be recovered, was created by the fraud of the defendant, and this the plaintiffs are ready to verify, wherefore they pray judgment, etc.

3D REP. TO 2D AND 3D PLEAS.

And for further replication in this behalf as to each of said pleas secondly and thirdly above pleaded, the plaintiffs by leave of court

first had and obtained, say *precludi non*, etc., because they say that the said highwines so sold and delivered by plaintiffs to defendant as stated in the declaration, were so sold and delivered, not upon credit, but for cash, to be paid by the defendant to the plaintiffs therefor, on delivery, and that the plaintiffs caused said one hundred barrels of highwines to be delivered in successive dray or truck
21 loads, in the usual course of business, at the store-house of defendant in the city of Chicago, during the eighteenth day of July, 1870, with the understanding that the terms of said contract in the declaration mentioned would be complied with, and that said highwines would be paid for when such delivery was completed.

That such delivery was not completed until near the close of business hours, to wit: 6 o'clock in the afternoon of that day; that when said delivery was so completed defendant was not present and could not be found at his said place of business to make payment for said highwines, and he did not pay for the same; that it was then so late in the day that plaintiff's agents, who had charge of the delivery of said highwines, could not on that day cause said highwines to be removed from said defendant's store-house and so they were compelled to permit said highwines to remain in defendant's store-house until the next day, to wit: July 19, 1870, without receiving payment therefor.

The plaintiffs aver that defendant was then and there insolvent and about to fail in business, and that such insolvency was then well known to defendant, but wholly unknown to plaintiffs; and that immediately after said highwines had been so delivered at defendant's store-house under said contract declared upon, the defendant, well knowing that he had not paid for said highwines and had no right to dispose of the same until after he had paid therefor, and without the knowledge or consent of the plaintiffs, and fraudulently intending not to pay for said highwines, and to place the same where the plaintiffs could not enforce their rights therein to secure payment of the purchase price thereof, and thereby to cheat and defraud
22 the plaintiffs in the premises, caused said highwines to be delivered to the Michigan Central Railroad Company, to be shipped from the city of Chicago, consigned to a consignee at the city of New York; and defendant then and there procured said railroad company to issue to him bills of lading for said highwines so shipped and consigned as aforesaid; and defendant then and there drew drafts upon said consignee to whom said highwines were so shipped, to wit: for a large amount, $5,700, and then and there attached said bills of lading to said drafts, and presented and delivered said drafts, with said bills of lading so attached, to the National Bank of Commerce of the city of Chicago, and procured said bank

to discount said drafts for said defendant on the credit of said bills of lading so attached thereto; and that said bank then and there did accordingy so discount said drafts on the security of said bills of lading, and gave the defendant credit at said bank for the amount thereof, upon which the defendant then and there drew checks to the amount of said drafts; which checks were then and there certified, and afterwards paid by said bank, and that the defendant thereby fraudulently invested said bank with a lien and claim on said highwines for the amount of said drafts so discounted for defendant, not only as against the said defendant, but also as against the plaintiffs, notwithstanding the defendant had not paid plaintiffs for said highwines, all of which was contrived and done by defendant with intent to (and the defendant thereby did) obtain said highwines without payment therefor as required by said contract, and thus cheat and defraud the plaintiffs in the premises; and after said defendant had so obtained and disposed of said highwines he
23 neglected and refused, and hath ever since, and at all times, wholly neglected and refused to pay the plaintiffs for said highwines, as required by said contract; and so the plaintiffs in fact say that said debt in the declaration mentioned and sought to be recovered in this suit, was created by the fraud of said defendant, and is, by the act of Congress in that behalf, excepted from the operation of the said supposed discharge in bankruptcy in said pleas mentioned; and this the plaintiff is ready to verify. Wherefore they pray judgment, etc.

* * * * *

And afterwards, to wit: on the 4th day of March, A. D. 1887,
26 there were filed in the office of the clerk of said court certain rejoinders, which are in words and figures, as follows, to wit:

IN THE SUPERIOR COURT OF COOK COUNTY.

STATE OF ILLINOIS, } ss.
27 COOK COUNTY. }

Robert Moir et al. }
vs. } *Rejoinders.*
Wilson Ames. }

And the defendant, as to the first replication of the plaintiffs to the second and third pleas of the defendant and each of them, and which the plaintiffs are ready to verify by the record, etc., doth the like.

And the said defendant as to the second replication of the plaintiffs to the second and third pleas of the defendant, and each of them, says that the plaintiffs ought not, by reason of anything in that replication alleged, to have their aforesaid action against him, the defendant, because he says that the said supposed debt in the plaintiff's declaration mentioned and sought to be recovered in this action, was not created by the fraud of this defendant as alleged in said replication; and this the defendant prays may be inquired of by the country, etc.

And the plaintiffs doth the like.

And the defendant, as to the third replication of the plaintiffs to the second and third pleas of the defendant, and each of them, says that the plaintiffs ought not, by reason of anything in that replication alleged, to have their supposed claim *accepted* [excepted] from the oper ation of the discharge of this defendant in bankruptcy, because he says that the debt of the defendant to the plaintiffs, if any ever existed, was not created by the fraud of this defendant, and was
28 not thereby excepted from the operation of the discharge in bankruptcy set forth in said second and third pleas of the defendant; and of this the defendant puts himself upon the country, etc.

JOHN G. REID and
WM. H. BARNUM,
Attys. for Deft.

And the plaintiff doth the like.

EDSALL & EDSALL,
Attys. for Pltffs.

And afterwards, to wit: on the 16th day of May, A. D. 1887, the same being one of the days of the May term of said court, the following among other proceedings were had in said court and entered of record, to wit:

Robert Moir et al.
100,894 *vs.* } *Assumpsit.*
Wilson Ames.

This cause being this day called for trial, again come the parties by their attorneys respectively, and issues being joined, it is ordered that a jury come, whereupon come the jurors of a jury of good and lawful men, to wit: Edward Lewis, C. Aidem, Jr., L. McClanthan, Louis E. Peterson, A. Wesche, John Marr, Sr., Walter Magnus, William Kerchner, Patrick J. Marony, John Ball, Henry Fraut and Peter King, who being duly elected, tried and

sworn well and truly to try the issues joined, and a true verdict render according to the evidence, and the hour for adjournment having arrived, it is ordered that said jury be permitted to separate until to-morrow morning.

* * * * *

30 And afterwards, to wit: on the 20th day of May A. D. 1887, the same being one of the days of the May term of said court, the following among other proceedings were had in said court and entered of record, to wit:

100,894 Robert Moir *et al.* *vs.* Wilson Ames. } *Assumpsit.*

This day again come the parties hereto by their attorneys respectively, and the jury empaneled herein also come after hearing all the evidence adduced, retire to their room to consider of their verdict, and the hour for adjournment having arrived, it is ordered that when said jury shall have agreed upon a verdict they shall reduce it to writing, sign and seal the same, and be permitted to
31 separate until to-morrow morning.

And afterwards, to wit: on the 21st day of May, A. D. 1887, the same being one of the days of the May term of said court, the following among other proceedings were had in said court and entered of record, to wit:

100,894 Robert Moir *et al.* *vs.* Wilson Ames. } *Assumpsit.*

This day again come the parties hereto by their attorneys respectively, and the jury empaneled herein also come and say, we the jury find the issues for the plaintiffs and assess their damages at the sum of ten thousand six hundred and thirty-four dollars and three cents; whereupon the defendant enters herein his motion for a new trial in said cause.

And afterwards, to wit: on the 18th day of June, A. D. 1887, the same being one of the days of the June term of said court, the following among other proceedings were had in said court and entered of record, to wit:

Robert Moir, John C. Nicol and James Peterson,
100,894 *vs.*
Wilson Ames.
} *Assumpsit.*

32 This cause coming on to be heard upon the defendant's motion heretofore entered for a new trial in said cause, after arguments of counsel, and due deliberation by the court, said motion is overruled and a new trial denied. Whereupon the defendant enters his motion in arrest of judgment; after arguments of counsel and due deliberation by the court, said motion is also overruled and denied.

Therefore it is considered by the court that the plaintiffs do have and recover of and from the defendant their said damages of ten thousand six hundred and thirty-four dollars and three cents in form as aforesaid by the jury assessed, together with their costs and charges in this behalf expended, and have execution therefor. Thereupon the defendant having entered his exceptions herein, prays an appeal from the judgment of this court to the Appellate court, in and for the First district of Illinois, which is allowed on filing his appeal bond in the sum of thirteen thousand dollars to be approved by the court, together with his bill of exceptions, within thirty days from this date.

And afterwards, to wit: on the 12th day of July, A. D. 1887, there was filed in the office of the clerk of said court a certain bill of exceptions which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

IN THE SUPERIOR COURT OF COOK COUNTY.

Robert Moir, John C. Nicholl and
33 James Peterson, late partners as Robert Moir & Co.,
vs.
Wilson Ames.
} *Assumpsit.*
General No. 100,894.

BILL OF EXCEPTIONS.

Be it remembered that after the jury was impaneled in this cause, and after the counsel for the plaintiffs had made their opening statement of the case to the jury, John G. Reid, Esquire, one of the

attorneys for the defendant, Wilson Ames, made to the jury, in behalf of said defendant, Ames, the following statements in his opening of the case to the jury, on said trial, to wit:

OPENING STATEMENT FOR DEFENDANT OF MR. REID, AS FOLLOWS:

May it please the Court and Gentlemen of the Jury:

Mr. Moir, senior member of the plaintiff's firm, was a member of the Board of Trade, and had an office with Phillips & Carmichael, who had been the agents and commission men dealing for the firm of Robert Moir & Co. for several years. Robert Moir & Co. carried on business at Oquawka; they were bankers, merchants and distillers, and from what I can learn, had the run of the town. There was at that time a speculation in whisky, and my client being engaged in distilling, Mr. Moir, through a broker named Wallace, sold to my client 200 barrels of highwines at $1.07 per
34 gallon; he then took Mr. Ames, the defendant, to Mr. Carmichael, who was also on the board, and introduced him; there was a Board of Trade contract made giving the parties the option to buy or sell according to the rules of the Board of Trade. Some time after that, as it appears from the papers, and appears from the testimony, there was a memorandum prepared by Mr. Wallace, this broker, which they claim was signed by my client. It was a mere memorandum, we claim; we do not remember to this day whether we signed it or not, and therefore we have not denied it under oath. He put his money, he put up the $600 in the hands of Mr. Carmichael, who was the agent. Mr. Ames and Mr. Carmichael frequently met on the Board of Trade, and upon the streets, and either jokingly or otherwise would ask, when are you going to call for your whisky; you must take it away, call for it, or we will deliver it. On the 15th, as it appears from the testimony in the former cases, Mr. Ames informed Phillips & Carmichael that he would take one hundred barrels. They told him that their place of business had been burned, that he would have to go on the market and buy it; and offered to settle upon the difference between the selling price of whisky that day and the price put in the contract. Mr. Ames would not do it; they could take down the margins; I won't settle upon the difference; he said: "Well, then I will take the whisky and carry it." At that time the market for this grade of whisky was in the city of New York or Boston, and the distillers, and those engaged in the business, made it a custom to keep the whisky down there for two reasons, so as to be ready to take advantage of a sudden rise

in the market, and another reason was, all of them borrowed money upon their goods, and they could borrow money down there, getting the money at six per cent. or seven per cent., while the rate at that time here was ten per cent., and the rate of insurance was less down there.

35 Mr. Ames, previous to this time, had made arrangements with parties in New York, and had been shipping them from day to day. He had been doing this from time to time, and they would get bills of lading, and draw drafts on the parties in New York; those drafts were discounted by the bank and placed to the drawer's credit.

They forced this contract upon us, and would not settle with us for the $600, so we took the whisky. The whisky was delivered, as the testimony shows, the last of it towards 6 o'clock at night. Some time after business hours. The next morning that whisky was shipped, and the evidence shows that at the time it was shipped Mr. Ames' place of business was full of whisky, the only reason I can account for it—these highwines were shipped—they were rolled in the last, and were taken out first. We did not pay for the goods, because we were not asked to pay, and we were never even asked to pay for them from that day to this; never a man whispered that we owed them one cent, but after fifteen long years, now they come up with an old stale claim.

Mr. Ames took those drafts, and he went to the bank as he had been in the habit of doing from time to time, and from day to day, and placed the money to his credit. On his way back to his place of business, this was about 10 o'clock, he learned that the sheriff had seized his place, and he didn't go back; he learned then also, of the replevin suits that were out for these goods, taking them all back. What did he do, what would you do? He didn't go around hunting up Phillips & Carmichael to pay them the money; he paid his money to certain other creditors that he had. Mr. Ames could have paid that bill. He wanted them to come and ask him to. Instead of doing that, they wanted the whisky—they got out the

36 replevin suit, they got the whisky, they got the fifty barrels. Mr. Ames came the next day and he was told all about it.

About a month or so after that, Robert Moir & Co., knowing all about this affair, commenced a suit against Phillips & Carmichael, their agents, for this money. Phillips & Carmichael said: "You come and pay our costs, and father these suits, and you may have the money." They would not do it; then we see there were two suits pending, the replevin suit on which they got the money or the goods, and the suit by Robert Moir & Co. for their money, against the agents having their own money. The bank having advanced

some money on these drafts, became defendant to the replevin suit, entered by error, as the evidence will show that they had made no demand on Mr. Ames. After the suits were commenced, Phillips & Carmichael came to Mr. Ames, and said, "You are gone up, somebody will put you into bankruptcy, let us take that $600 you have got and settle all this business for that 100 barrels of wine." Mr. Ames says: "I won't do that, you settle the contract for the other 100 barrels for which there has been no call, we will do that and call all things square." Phillips & Carmichael said they would not do it, they would not have anything to do with the other 100 barrels; we will do one thing provided you keep out and away from these lawsuits, you must not be a witness in these cases." Mr. Ames said, all right, I don't care anything about that, I am out of this scrape, so he went and signed the paper and let them take the $600. The bank did not want Mr. Ames in court either; they had a claim against him, so they got around Mr. Ames, and settled up their claim; they had several negotiations over it; they said: "if you will give us $2,500 and keep your mouth shut, and stay away,
we will settle up our claim against you, all the claim we have
37 against you, but you must stay away, for if it is known in
court, we will get beat." Both sides said the same thing, so they paid the bank $2,500, and those two suits were litigated over and over, and Mr. Ames was never called as a witness by either side, and he was the most prominent man in both proceedings.

In the replevin suit it was held the bank was entitled to the money, and they paid them the money; the bank in the meantime had been settled with; if Mr. Ames had been called upon the stand that fact would have appeared; that business was all wound up in 1873. Mr. Ames tried then to settle up his business himself, but he could not; he went into bankruptcy in the State of New York, and got his discharge.

We do not deny but what there was a contract made; we do not deny but that it was an oral contract made upon the Board of Trade. This paper, if it was signed by us, it was a mere memorandum. Mr. Robert Moir had cause of action against us after getting the whisky; he had cause of action for the proceeds of the property. They had cause of action against us, not upon this paper, not upon the contract that was made, because that had been annulled, that had been set aside, but for the proceeds of the goods wrongfully obtained. We got their goods, and we had consigned and pledged them; they had a cause of action against us, but that was outlawed in five years; they could not bring that, and they had to bring action upon this little piece of paper.

Be it further remembered, that on the trial of this cause, the

plaintiffs gave in evidence on their behalf as follows: E. A. Otis, being duly sworn testified thus: I am a lawyer by profession, and was such in 1870, and in the replevin suit commenced July 19, 1870, in the Superior court of Cook county, by the firm of Phillips
38 & Carmichael against the Michigan Central Railroad Company for fifty barrels of high wines. I nominally appeared for the defendant railroad company, but in reality I represented the National Bank of Commerce. The case was tried by Mr. Horton and myself for the defendant—I was the attorney for said bank in that case—William C. Goudy was the attorney for the plaintiffs. I know that he produced upon that trial a paper purporting to be a contract for the sale of a hundred barrels of highwines, and it was put in evidence in that case. We got beat below and had to go to the Supreme court to get the case reversed, and I wrote a brief in the case, and examined the record in the case with unusual care.

There was a bill of exceptions prepared and I know it was correct. A copy of the record was sent to the Supreme court in time for its September term in 1871; sent before the October fire of that year, and the original record was burned up in that fire.

The appellant's brief had been filed. I had filed the brief in the case. Judge Goudy's reply was not on file at the time of the fire.

(Witness was asked to examine a document handed him, purporting to be a transcript from the Supreme court of Illinois of the pleadings, and the order of the court showing the trial of that case, and a part of the evidence, and his attention called to a paper appearing therein, and witness was then asked.)

Q. What it is, or is a copy of?

(To which question counsel for the defendant objected, and upon statement to the court by plaintiff's counsel that their
39 object was to introduce secondary evidence as to the contents of this paper that is lost, and that they expect to prove by Mr. Goudy that the original was burned in his office, the court ruled that witness might answer subject to the objection, to which ruling the defendant then and there excepted.)

Witness then answered: This paper is a copy of the contract which Judge Goudy offered in evidence on that trial.

(Counsel for defendant objected to the characterizing of this paper as a contract.)

The COURT: "Call it a document."

The WITNESS: "Yes, sir, a document, if you will qualify it; a document — paper — whatever it was."

Counsel for plaintiffs then offered in evidence the affidavit, declaration and pleas in said replevin suit, appearing in the transcript

certified to by the clerk of the Supreme court, to which offer the defendant's counsel stated they did not object, and same were considered as received in evidence, and are as follows:

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

SUPERIOR COURT OF CHICAGO.

William N. Phillips Thomas S. Phillips and George S. Carmichael, partners under the style of Phillips and Carmichael,
vs.
The Michigan Central Railroad Company.

40 Thomas S. Phillips, being sworn, says that Robert Moir & Co., of the County of Henderson and State of Illinois, are the owners of fifty barrels iron bound highwines marked J. C. Conklin, Distiller, of the value of three thousand two hundred and fifty dollars; that Phillips and Carmichael, of the county of Cook and State of Illinois, a firm composed of William N. Phillips, Thomas S. Phillips and George S. Carmichael, are the agents of said Robert Moir & Co., and as such are lawfully entitled to the possession thereof, and that the same have not been taken for any tax, assessment or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of the said Robert Moir & Co., or of the said Phillips and Carmichael, liable to execution or attachment.

And this deponent further says that the said property is now wrongfully detained by the Michigan Central Railroad Company, Wherefore he prays in behalf of the said William N. Phillips, Thomas S. Phillips and George S. Carmichael, partners as aforesaid, for a writ of Replevin according to the form of the statute in such case made and provided.

THOS. S. PHILLIPS.

Subscribed and sworn to before me this 19th day of July, 1870. }
[SEAL.] THOMAS S. MCCLELLAND.

DECLARATION.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

SUPERIOR COURT OF COOK COUNTY.

41 SEPTEMBER TERM, 1870.

William N. Phillips, Thomas S. Phillips and George S. Carmichael, partners, under the firm name and style of Phillips & Carmichael, plaintiffs, by Goudy & Chandler, their attorneys, complain of the Michigan Central Railroad Company, a corporation existing and doing business in the State of Illinois, defendant, summoned, etc., of a plea whereof it took the goods and chattels of the plaintiffs and unjustly detained the same against sureties and pledges; for that the defendant on the 19th day of July in the year of our Lord, one thousand eight hundred and seventy in the city of Chicago, to wit: in said county, in a certain building there situated, called the Michigan Central Railroad freight depot, took the goods and chattels of them the said plaintiffs, to wit: fifty barrels, "iron" bound, of highwines, marked J. C. Conklin, distiller, of great value, to wit: of the value of three thousand two hundred and fifty dollars, and unjustly detained them against sureties and pledges, etc.

And also, wherefore, the said defendant unjustly detains the goods and chattels of the plaintiffs against sureties and pledges, etc.; for that the defendant on the 19th day of July in the year of our Lord, one thouand eight hundred and seventy at the city of Chicago, to wit: at said county of Cook, in a cer ain building there situated, called the Michigan Central Railroad freight depot, the goods and chattels of the plaintiffs, to wit: fifty barrels, iron bound, of highwines, marked J. C. Conklin, distiller, of great value, to wit: of the value of three thousand two hundred and fifty dollars, unjustly detained against sureties and pledges, to the damage of the plaintiffs of four thousand dollars, and therefore they bring suit, etc.

GOUDY & CHANDLER,
Attys. for Plaintiffs.

42 PLEAS.

SUPERIOR COURT OF COOK COUNTY.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

SEPTEMBER TERM, A. D. 1870.

The Michigan Central Railroad Company,
ads.
William N. Phillips, Thomas S. Phillips and George S. Carmichael.

And the defendant, by Walker, Dexter & Smith, its attorneys, comes and defends, etc., and says that it does not wrongfully detain the said goods and chattels in said declaration mentioned, or any part thereof in manner and form as therein alleged. And of this it puts itself upon the country, etc.

WALKER, DEXTER & SMITH,
Defts. Attys.

SUPERIOR COURT OF COOK COUNTY.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

SEPTEMBER TERM, A. D. 1871.

The Michigan Central Railroad Company
ads.
William N. Phillips, Thomas S. Phillips and George S. Carmichael.

43 And the defendant, by Walker, Dexter & Smith, its attorneys, comes and defends the wrong and injury, etc., and says that it did not take the said goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff in said declaration hath alleged against it. And of this it puts itself upon the country, etc.

WALKER, DEXTER AND SMITH,
Defts. Attys.

SUPERIOR COURT OF COOK COUNTY.

SEPTEMBER TERM, A. D. 1870.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

The Michigan Central Railroad Company
ads.
William N. Phillips, Thomas S. Phillips and George S. Carmichael, partners under the style of Phillips and Carmichael. } *Replevin.*

And the defendant, by Hoyne, Horton and Hoyne, its attorneys, comes and defends the wrong and injury, etc., and says that it did not take the said goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof in manner and form as the plaintiff in said declaration hath alleged against it, and of this it puts itself upon the country, etc.

44 And for a further plea in its behalf, said defendant says, *actio non*, because that it does not wrongfully detain said goods and chattels in said declaration mentioned, or any part thereof, in manner and form as therein alleged, and of this it puts itself upon the country, etc.

And for further plea in this behalf, defendant says, *actio non*, because it says that the property of the said goods and chattels in the said declaration mentioned, at the time when, etc., was in one J. C. Conklin, without this that property of the said goods and chattels, or any part thereof at the said time when, etc., was in the plaintiffs, as by the said declaration is above supposed, and this the defendant is ready to verify; wherefore it prays judgment, etc.

And for further plea in this behalf, defendant says, *actio non*, because it says that the property of the said goods and chattels in the said declaration mentioned at the time when, etc., was in the National Bank of Commerce, a corporation existing and doing business in the State of Illinois, without this that the property of the said goods and chattels, or any part thereof, at the said time when, etc., was in the plaintiffs as by the said declaration is above supposed, and this the defendant is ready to verify; wherefore it prays judgment, etc.

And for a further plea in this behalf, defendant says, *actio non*, because it says that the property of the said goods and chattels in

said declaration mentioned, at the time when, etc., was in the National Bank of Commerce, a corporation existing and doing business in the State of Illinois, as security for money loaned upon said goods and chattels as pledges for the re-payment of the same;
45 without this that property of the said goods and chattels or any part thereof, at the said time when, etc., was in the plaintiffs, as by the said declaration is above supposed; and this the defendant is ready to verify, wherefore it prays judgment, etc.

HOYNE, HORTON & HOYNE,
Defts. Attys.

The COURT: "Is this a correct and true copy of the document Goudy had?"

(Referring to the paper appearing on page 13 of the transcript.)

ANSWER: "Yes, sir."

Witness then, in answer to a question, stated that he remembered what evidence was put in by the National Bank of Commerce, or by him in its behalf, in support of the plea in said suit which set up that the bank was the owner of the high wines replevied, as pledgee. In support of that plea, there was offered in evidence, "two drafts drawn by Wilson Ames on W. S. Miller in New York, I think, and pinned to each draft was a bill of lading for fifty barrels of high wines." The amount of each draft was, "I think, $2,800 or $2,900". "I can state, I think, by looking at the copy of the draft which I have seen in the record."

George S. Carmichael and Thomas S. Phillips, of the firm of Phillips and Carmichael, were both examined as witnesses in that replevin suit.

I paid careful attention to the testimony they gave in that case, and their testimony was embodied in the record that was sent to the Supreme court. They are both dead, I knew them both well. I attended Mr. Phillips' funeral, I think, two years ago. I have examined what purports to be a copy of their testimony as it
46 appears in that transcript, and have read it with sufficient care to be able to state whether it corresponds with my recollection of what the testimony actually was which they gave.

Q. Can you state, either from your own recollection or by your memory as refreshed by referring to any document that you want to and know to be correct, what their testimony was on that occasion?

Counsel for defendant says that if the question will be answered, yes or no, he will not interpose an objection. If there is anything more, objection is made to his stating.

The COURT: Answer that question, yes or no.

A. "I would have to qualify that; I could not give the evidence in full, but I think I could give the substance of it."

PLAINTIFF'S COUNSEL: "Without reference to any document?"

A. "By refreshing or having refreshed my recollection from this copy."

PLAINTIFF'S COUNSEL: "Now, we might as well present the question. I want to ask the witness, and ask Mr. Goudy and, perhaps, Mr. Horton, who participated in the trial of that case, what those witnesses testified to, on this ground, your Honor. The replevin suit was nominally between Phillips and Carmichael, on one side, that firm, and the Michigan Central Railroad Company, on the other. The witnesses are dead. It relates to the same subject-matter, as your Honor will see by looking at the issues in that case, and the testimony itself as drawn out here. We claim, and I haven't any question in my own mind but what it is correct, that such privity appears between the parties on the respective sides of that case and the present, that the evidence given in that case—the wit-
47 nesses being dead—may be received here." I offer to prove what that evidence was.

(Defendant objected to the testimony of any witness or witnesses in any other suit or suits, whether the witnesses are living or dead, to which the defendant in this suit was not a party. It was stated and admitted by the respective counsel that the pleadings in the replevin suit, as they appear in said transcript, were in evidence without objection; also admitted that the original files of that case have been destroyed, but counsel for defendant do not admit that this a correct transcript of the original.)

(And counsel for defendant stated that "the pleadings as offered in that document we do not object to. The testimony we do object to. We have never had a chance to object to the whole document. We admit nothing but the pleadings.")

Counsel for plaintiffs then offered in evidence the certified copy of the judgment of the Superior court in that replevin suit, as it appears in this transcript, and defendant's counsel admitted it might be received. The same is as follows:

ORDER OF JUDGMENT.

William N. Phillips *et al.*
vs.
The Michigan Central Rail Road Company.
} *Replevin.* 3172, 31085.

This day again come the parties to this suit by their attorneys respectively as aforesaid, and thereupon on the agreement of the parties now here made in open court, this cause is submitted to
48 the court for trial upon the issues joined herein without the intervention of a jury.

And the court now here after hearing all the evidence adduced in said cause by the parties and the argument of counsel, and being fully advised in the premises, finds the defendants guilty, and that the property replevied in this cause, and the right of possession of the same, is in the plaintiffs, and assesses their damages against the defendant to the sum of one cent.

Therefore it is considered by the court that the plaintiffs do have and retain the property replevied by virtue of the writ of replevin issued in said cause, and do have and recover of and from the said defendant their said damages of one cent in form as aforesaid by the court assessed, together with their costs and charges in this behalf expended and have execution therefor.

And the defendant having entered its exceptions herein pray an appeal to the Supreme court of this state from the judgment of this court, which is allowed to it on filing its appeal bond herein in the penalty of two hundred and fifty dollars with security to be approved by one of the judges of this court, and to be filed, together with its bill of exceptions, within twenty days from this date.

THE COURT: Now, you want to show what certain witnesses in that case testified to?

PLAINTIFF'S COUNSEL: Yes, sir.

THE COURT: And it is in evidence that those witnesses are dead?

DEFENDANT'S COUNSEL: Yes, sir.

THE COURT: "Why is not that admissible if they are dead, and these proceedings were really in reference to the same property?"

49 Defendant's counsel stated that he objected on the ground that the testimony was taken in a suit between different parties from the present suit. That the suit involved different matters, that the issues to be tried were different, and that the defendant in the present suit had not an opportunity of cross-examination.

THE COURT: "This question of the admissibility of the testimony

of a deceased witness is a thing not altogether free from doubt. But, on the whole, I am inclined to think I should let it in. It is stated here by counsel that the defendant did in fact have notice, and of course I see by reading the report in the 60th and 69th (Ills. Reports) that he must have known what was being done to a greater or less extent, and counsel for defendant themselves have stated that he was advised that he would not be required on either side; and counsel for plaintiffs further states that he will show that he had actual notice, and the affidavit in the replevin suit is made by the party as agent of the plaintiffs here in the present suit. But that would not cut any figure. But I think I shall let the testimony in, so far as it is germain to the issue here. You can save an exception if I am wrong about it."

COUNSEL FOR DEFENDANT: "Very good. We will save the exception." E. A. Otis, the witness, further testified that this paper appearing on page 13 of this transcript, is a copy of the original paper offered in evidence in that replevin suit on the part of the plaintiffs by Mr. Goudy. That he was present at the examination in that case of the witnesses George S. Carmichael and Thomas S. Phillips. "By refreshing my recollection by an examination of a certified copy of their evidence as contained in the bill of exceptions, I am enabled to say that the evidence as given here is correctly given" "in the transcript" now before me. I speak in reference to the testimony of both of them. "I have read them both over with reference to my recollection of what they testified to on the trial." This replevin suit was taken to the Supreme court of Illinois at the September term, 1871.

Counsel for plaintiffs then offers in evidence the remanding order of the Supreme court, to which counsel for defendant stated that they objected to the inquiry and to the remanding order, because it is not relevant to the issues in this case. The plaintiffs, Moir & Co., by their agents, Phillips & Carmichael, making affidavit that they were proceeding for Moir & Co. replevied this whisky and took it away and sold it. They never gave it back to us."

The COURT: "That I don't know anything about, yet."

COUNSEL FOR DEFENDANT resumed: "Well, they have stated that, and this appears already by what has been admitted without objection, that they filed an affidavit in which they said they were proceeding for Moir & Co.; that a writ of replevin issued and they got judgment in that case in the court below. Counsel stated in his opening that they proceeded to sell that whisky and sold it to Shufelt & Co. and got the money and put it in bank. That will appear. My objection is this: When they have proceeded for the whisky in replevin upon the theory of a disaffirmance of

the sale of the whisky by them, and upon that theory of disaffirmance or rescission, or both, or non-delivery—that there was no delivery of the whisky to us, and it was their whisky after the attempted delivery, as well as before—on all those theories of
51 disaffirmance, rescission, a non-delivery or non-legal delivery, they proceeded and got a judgment in replevin against the defendant, and subsequent proceedings interest us no more, nor them either as far as we are concerned. The whisky was sold to Shufelt & Co. and Phillips & Carmichael, the plaintiff's agents, got the money and then Moir & Co. sued their agents for this money. They got the whisky on the replevin suit, and sold it, and never did and never can return it to us, and they are estopped from going on to show that this judgment was reversed. In the first place they had two remedies—they were inconsistent and antagonistic; they had their choice, but cannot have both. They followed one remedy for the highwines itself, and got it and sold it, and sued their agents for the money, and now they are suing us for the money after they have put the highwines where they can never return it to us. We object to their showing what became of the judgment of the Superior court in the Supreme court."

The COURT: I do not think that it is necessary at this point to determine the question which you now raise one way or the other. It having gone in without objection that there was a judgment obtained in the court below in that replevin suit, I probably ought to allow them to show that judgment was reversed, whatever the effect of it might be hereafter.

Counsel for defendant said, we will save the point, as we made the objection for the purpose of preserving our rights.

The COURT: It may go in, and the main point raised by the defense may be considered later.

The mandate of the Supreme court, stating the order re-
52 versing the judgment of the Superior court in that replevin suit, entered April 11, 1872, was then received in evidence, which was filed in the Superior court on May 14, 1872, and is as follows:

At a Supreme court, begun and held at Ottawa, on Tuesday, the 12th day of September, in the year of our Lord one thousand eight hundred and seventy-one, within and for the Northern grand division of the State of Illinois.

Present: CHARLES B. LAWRENCE, Chief Justice.
" PINCKNEY H. WALKER, Associate Justice.
" SIDNEY BREESE, " "
" JOHN M. SCOTT, " "
" WM. K. MCALLISTER, " "
" ANTHONY THORNTON, " "
" BENJAMIN R. SHELDON, " "
In vacation after September term, A. D. 1871.
April 11, A. D. 1872.

The Michigan Central Railroad Company
536 *vs.*
William N. Phillips, Thomas S. Phillips and George S. Carmichael.

Appeal from Superior court of Cook county.

On this day again come the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now suficiently advised of and concerning the prem-
53 ises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

Therefore it is considered by the court that for that error and others in the record and proceedings aforesaid, the judgment of the Superior court of Cook county, in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and that this cause be remanded to the Superior court of Cook county, for such other and further proceedings as to law and justice shall appertain.

And it is further considered by the court that the said appellants recover of and from the said appellees their costs by them in this behalf expended, and that they have execution therefor.

I, Woodbury M. Taylor, clerk of the Supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of the said Supreme court in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Supreme court at Ottawa, this 9th day of May, in the year of our Lord, one thousand eight hundred and seventy-two.

[SEAL.] W. M. TAYLOR,
Clerk of the Supreme Court.

The attention of the witness was called to what purports to be Exhibits A and B, to the deposition of William W. Bell, as the

same appears in this transcript from the Supreme court, and then asked:

Q. Do you recollect anything as to the offering in evidence on the trial of this replevin suit before Judge Gary in May, 1871, of the drafts and bills of lading?

54 Counsel for defendant objected, because it is a matter happening after the claimed sale, and does not concern this case at all, as it was no matter as far as this case is concerned, as to what was done with the goods after the claimed delivery.

Counsel for plaintiffs insisted that the law is where a party gets the physical possession of property under a sale for cash, and disposes of it as they claim to be able to show the defendants disposed of this property, there is such fraud as takes the case out of the operation of a discharge in bankruptcy, and stated that they wanted to prove Ames made drafts and had them discounted on the security of the bills of lading, which he received from the Michigan Central Railroad Company when he shipped the goods.

Counsel for defendant in reply stated that plaintiffs want to prove two different and inconsistent facts. First: They want to prove there was a delivery to the defendant according to contract, and then they want to show there was not any delivery. Counsel stated their position to be that the plea of a discharge is not overcome in a suit on a claim such as they are suing on here, by a replication that the debt was created by fraud. Plaintiffs have filed a replication to the plea of d scharge in bankruptcy, in and by which they claim, in substance, that the debt sued on was created by fraud, and therefore the discharge is not a good defense. We claim that the language "a debt created by fraud" does not apply to a case such as this. The debt sued on in this case is the price of so many barrels of whisky at so much a gallon. They sue in assumpsit on a contract. That is the debt sued on. That debt they say was made by a written contract, and they have de-

55 clared as upon a written contract. The debt sued on is a debt created upon a claimed written contract, and they had to declare upon a written contract in order to sue after five years. They must prove that this debt was created by a written contract, and if it is, how is it created by fraud? At the time the so-called contract was made, none of these things they are now trying to prove to overcome the plea of discharge in bankruptcy existed.

They should not be permitted to prove what was done more than a month after the execution of this claimed contract—certainly not what was done after the delivery of the goods, for the purpose of proving fraud in the creation of the debt. If the paper declared on was a contract, it created the debt sued on, and it was not created by

fraud. The evidence offered could not be admissible at any stage, because it has no tendency to prove that at the time of the creation of the debt there was any intention of fraud.

By the COURT: "The argument of counsel is double. One position is well taken, and the other, in my judgment, is not. The position that this is properly in rebuttal is correct and sound. That is what I have said to begin with. But the other position is not sound. It is splitting hairs. If I correctly understand the counsel, his position is this. While admitting that under the bankrupt law from a debt created by fraud the party is not discharged, yet if A enters into a contract with B, whereby B is to deliver him a certain quantity of goods in the future, and is to pay cash on delivery the moment the goods are delivered, if B should bring the goods to A's place of business thirty days after that contract was entered into, and A by some legerdemain should induce him to deliver the goods and lock the door in his face while he slipped the goods through
56 some side entrance and conveyed them away."

Counsel for defendant interposes the remark "This is purely illustration," and the court proceeds:

"(This is purely illustration) then there was no debt created in fraud, because the contract was entered into thirty days before for the delivery of the goods, and if he took advantage of the bankrupt act the next week, he would be discharged from that indebtedness. It is contrary to my understanding of the law."

DEFENDANT'S COUNSEL: "It does not arise at this stage."

The COURT: "No, it does not."

DEFENDANT'S COUNSEL: "Nevertheless, it was my duty to stop its being entered upon."

The COURT: "It is discretionary with the court. I tried to head the General off until you offered your discharge."

DEFENDANT'S COUNSEL: "How do you know we will put the discharge in?"

The COURT: "I do not know."

DEFENDANT'S COUNSEL: "We may not follow the procedure your Honor says is right. So, I object to their entering upon any proof of alleged fraud, either of the sort offered by this testimony, or any other, in support of the replication to the plea of discharge in bankruptcy at this stage."

The COURT: "Your objection is well taken, as to whether it is rebuttal or not. But it is discretionary with the court, whether the rebutting testimony shall come in first or last. Ordinarily we save rebutting testimony until the last. I tried to head off the General and have him try it according to my notion, but he did not
57 seem inclined to do so. Now, let him try it according to his

own. Now, go back to the question which is before us, which is this"—

DEFENDANT'S COUNSEL: "I preserve an exception."

The COURT: "Whether this witness shall be allowed to testify as to certain exhibits or documents that were introduced on the trial of that case. That is really what is before the court now. There is no evidence yet before the court that the original documents were destroyed, that I know of. Until that is produced, no secondary evidence can be produced."

PLAINTIFF'S COUNSEL: "The witness did so state in the early part of his examination."

The COURT: "Then, assuming that the original documents are lost or destroyed, so secondary evidence would be admissible, then I consider it as admissible to show just what action was taken by the defendant immediately after the delivery of the goods, as bearing upon the question whether there was any fraud perpetrated or attempted to be perpetrated by the defendant in getting the goods and not paying for them."

DEFENDANT'S COUNSEL: "We object to the ruling at this stage, and then object generally, and wish to present it again at the proper stage, when the proper time comes."

The COURT: "If you have any authorities."

DEFENDANT'S COUNSEL: "I have plenty of them. The courts have so held."

The COURT: "I cannot see how any such interpretation can be given to it. Answer first whether these documents have been destroyed?"

WITNESS: "The two drafts with bills of lading attached, of which copies appear in the exhibits now here, were annexed to
58 Bell's deposition in the replevin suit, and were burned up in the great fire. The deposition was introduced in evidence in the replevin suit with the exhibits, the drafts and bills of lading."

DEFENDANT'S COUNSEL: "Bell is living, is he not?"

A. "I don't know; the exhibits were burned up."

Witness further testified: Exhibit A to Bell's deposition appearing in this transcript, is a copy of the original draft of Wilson Ames on W. S. Miller of New York, payable to the National Bank of Commerce. The original of which was introduced in evidence on the trial of that replevin suit. The draft was for $2,800, with the bill of lading of the Michigan Central Railroad—Blue Line—for fifty barrels of high wines attached. Exhibit B is a similar draft of Wilson Ames on Miller of New York, payable to the order of the cashier of the National Bank of Commerce for $2,900, the original of which was introduced in evidence on the trial of that

replevin suit, and attached to that was another bill of lading of similar import of this railroad company for fifty barrels of high wines.

Each draft had been properly protested at the time it was offered in evidence.

DEFENDANT'S COUNSEL: "All this is subject to our objection."

PLAINTIFF'S COUNSEL: "Yes, sir."

WITNESS: The exhibits to which I refer are copies of the originals offered in evidence on that trial, and they were left on file and burned.

PLAINTIFF'S COUNSEL: "I wish to have those regarded as in evidence, Exhibits A and B."

DEFENDANT'S COUNSEL: "Subject to the same objection and exception."

The COURT: "Yes, they go in subject to exception."

59 WITNESS: "I was employed to defend this replevin suit in the interest of the National Bank of Commerce. Was so employed very shortly after the suit was begun. I should think the next day. That was in July, 1870—about the 20th, I think. While that suit was pending, and before it was brought to trial, I met the defendant, Wilson Ames, on the cars when I was returning from New York. We rode together for an hour or two. This, I think, was in April, 1871. I remember it because I spent Easter in New York and left the next day, and met Ames on my way home, and we rode together and conversed about this replevin case. The trial was, if I remember right, in May, and this was in April previous.

Cross-Examination.

In that conversation with Ames on the cars, my recollection is that I told Ames I wouldn't care about him as a witness in that suit. I won the case eventually. I represented the National Bank of Commerce, who had received the bills of lading with these drafts. The witnesses, on the trial of this replevin suit, stated that these wines that they replevied were sold by Phillips and Carmichael to H. H. Shufelt and Co., and that they got the money for them. I only know by common report that Moir and Co. sued Phillips and Carmichael for that money. I was not in that suit.

(Plaintiffs then offered in evidence the judgment of the Superior court of Cook county, appearing on page 503 of Record Common Law, volume 4, of said Superior court, 1871, which was as follows:)

"FRIDAY, July 5, 1872.

Court met, pursuant to adjournment.
Present, as yesterday.

William N. Phillips, Thomas S. Phillips and George S. Carmichael
vs.
The Michigan Central Railroad Company.
} *Replevin.*

This day again came the parties to this suit by their attor-
60 neys respectively, as aforesaid, and thereupon, on the agreement of the parties now here made in open court, this cause is submitted to the court for trial upon the issues joined herein without the intervention of a jury, and the court now here, having heard all the evidence adduced in said cause by the parties, and the arguments of counsel, and being fully advised in the premises, upon the first, second, third and fourth pleas of the defendant filed herein, finds the issues for the plaintiffs, and upon the issues raised by the fifth plea of said defendant filed in said cause, the court finds the issues for the defendant, and that the property replevied in said cause and the right to the possession of the same, is in the National Bank of Commerce as pledgee to secure the repayment of money loaned upon same. Therefore it is considered by the court that the defendant do have and recover of and from the plaintiffs its costs in this behalf expended, and have execution therefor, and that a writ of *retorno habendo* do issue herein for the return of the property replevied by virtue of the writ of replevin issued in said cause."

Cross-Examination by Defendant's Counsel.

The witness, being further cross-examined, testified that he was at that time one of the directors of the National Bank of Commerce, and that B. F. Haddock was president of same, and so continued to be until his death.

Q. About that time did you know of Benjamin Haddock,
61 the president of that bank, going down to Akron, Ohio, to see Mr. Ames, and coming back with $2,500? A. I know he went to Akron, Ohio, and the bank received $2,500.

Q. As coming from Mr. Ames? A. Well, it came from—it arose out of a controversy with Barnes Bros. with the Ames transaction.

Q. Mr. Haddock got it from Ames and brought it up here? A. He got it, as I understand from Barnes Bros.

Q. At the instance of Mr. Ames? A. At the instance of Mr.

Ames, on drafts that the bank held; paid their drafts that the bank held, got by Mr. Ames.

Q. And you knew of Mr. Haddock, as president of the bank, to have a settlement with Mr. Ames? A. Yes, sir; I knew he went down. I went down myself once in July previous.

Q. To arrange matters with him? A Yes, sir.

PLAINTIFF'S COUNSEL: You said that the $2,500 Haddock collected from Ames on their drafts which have been mentioned in this suit, which Ames had drawn in favor of the bank, was from Barnes Bros.? A. I remember that the bank held other drafts drawn by Ames of Akron, and I went down in July to Akron to see what could be done towards the collection of those drafts, and suits were threatened, but I don't know but begun—threatened against Barnes Bros. Finally Mr. Haddock went to Akron, and the result of some negotiations was that the bank collected $2,500. They held other paper. It was, as I understood it, as a director of the bank, it was on the Barnes Brothers drafts that this was collected.

62 DEFENDANT'S COUNSEL: You went to investigate the good faith and honesty of Mr. Ames' conduct, and found it all right, did you not?

(Objected to.)

The COURT: The objection is sustained unless it has some connection with this matter.

DEFENDANT'S COUNSEL: I mean inclusive of this matter.

The COURT: The objection is sustained.

(Exception by defendant.)

PLAINTIFF'S ATTORNEY: In connection with this judgment just read in evidence, I offer in evidence the opinion of the Supreme court contained in Volume 60 of the reports of the Supreme court of Illinois, in the case of the Michigan Central Railroad against William N. Phillips and others—the opinion on page 192.

(Objected to, and objection sustained, and exception by plaintiffs.)

THOMAS LYNCH, duly sworn on the part of the plaintiffs, testified as follows:

I was engaged in the distillery business during the months of June and July, 1870, at Chicago, and was then acquainted with the defendant, Wilson Ames, and also with the firm of Phillips & Carmichael, who were engaged in the commission business in this city. Wilson Ames was then engaged in the rectifying business, I think, and carried on business on River street, in this city, and my place of business was distant from that, pretty close to a mile—three-quarters of a mile. I couldn't say exactly. To the best of my re-

collection, Ames suspended business in July, 1870, but can't state the date. Shortly before this my agent sold fifty barrels of
63 high wines on my account to Phillips & Carmichael, to be delivered to Mr. Ames. The instructions I received was to deliver them to Mr. Ames. If I recollect right, my sale was at 98 cents per proof gallon. I caused those high-wines to be delivered at Wilson Ames' place of business, the same day I sold them, which I think was on the 18th; my delivery commenced about five o'clock in the afternoon, and I presume was completed at about six o'clock. It would not take over an hour to deliver, for I could ship fifty barrels on three teams. As far as my recollection is, I think Phillips & Carmichael bought the high-wines of me for Robert Moir & Co. and were to be delivered to Mr. Ames. As far as my recollection goes, I think Phillips & Carmichael told me to make out my bill for $1.07 per proof gallon, and collect this from Ames, and pay them the difference between that price and 98 cents per proof gallon. The wines were delivered at Ames' place of business on River street in this city, but I did not collect the money from Ames on those wines as instructed. I sent there for it, and I know it was not collected of Ames. Subsequently, Phillips & Carmichael paid me for the fifty barrels of high-wines, at, I think, 98 cents per proof gallon. I did not go down the next morning after the wines were delivered to Ames. I don't know how long this was before Ames suspended business; some time before this I contracted to sell Wilson Ames some high wines on account of my company, Thomas Lynch & Co., but they were not delivered. The amount was 500 barrels, if I recollect right. I canceled the contract. As to the time I was to deliver the 500 barrels, my books have been burned and it is about sixteen years ago, and I forget all about it. Ames paid me, I think, $1,500 or $2,000, and on that payment I canceled the contract with him. I cannot tell how long this was before his suspension.

64 *Cross-Examination.*

I don't recollect whether this was before or after his suspension, I wouldn't say it was before. I couldn't tell how long before this I had known Wilson Ames as being in the rectifying business in Chicago. I may know him a year, or likely two years. I couldn't tell. Ames was in that business when I sold him those wines. He was doing a large business—a very large business, as I understood. I think that was the first deal I had with him. At the time I sold him the goods, he had a reputable standing as a solvent man, a fair business man, in the community. He was solvent when I sold him the goods.

Q. Now, Mr. Lynch. wasn't it a common practice in your business to get bills of lading and draw drafts against the bills of lading, and send the goods off east, and take advantage of any rising in the market suddenly arising in the east, to have the goods there so they wouldn't have to be shipped, and get low rates of interest and insurance down east? Wasn't that a common things? A. I could not tell you about interest and insurance, but I have shipped goods, and drew against them.

Q. Don't you know, that in order to get advantage of cheap interest and cheap insurance, large consignments of these goods were shipped by men in his trade, and in your trade—were shipped that year to take advantage of the rise in the market, were they not?

A. I presume it was carried on in that way.

65 Q. Was it or not a customary thing for dealers in liquors and highwines, rectifiers, to send off goods immediately after they were bought? A. Well, sir, so far as their custom is concerned, I couldn't tell you, but I know I have done it myself, shipped goods, and drew bills of lading.

Q. Wasn't it frequently the case in your experience that the goods you would buy, or persons would buy for the purpose of shipping and selling again, would be directed, not, to the place of the buyer, but to the depot to which they were to go to be consigned abroad? A. Yes, sir; I often got those instructions.

Q. In this case, were you not applied to by Phillips & Carmichael to have these very liquors delivered at some other place, or by Mr. Ames to have these very liquors delivered at some other place than his place? A. If Phillips & Carmichael should buy these goods from me, and then I get an order from Mr. Ames to ship those goods to New York or any other place, I should have done so.

Q. Would there have been anything suspicious, or unusual in the course of business, to have it done that way? A. No, sir.

Q. It would save handling the goods twice? A. Yes, sir.

Witness further testified:

If there had been any such instructions in this case, I should have complied therewith, and would not have considered it anything out of the way. I have made a great many sales of whiskies and wines in my day from my distillery.

66 Q. Wasn't it the custom and usage of your business in this city at that time, to make the deliveries one day, and collections the next day? A. Yes, sir.

Q. Wasn't that the universal and uniform custom? A. That is what I used to do myself. I don't know what other folks did.

Q. You endeavored to comply with the customs of business in this city, didn't you? A. Yes, sir.

Q. You sent around your bills the next morning, as that was the customary way? A. Sometimes I would and sometimes I would not—sometimes not for thirty or forty days.

Q. You would not necessarily send them around the same night? A. No, sir.

Q. Or 6 o'clock at night? A. No, sir.

Q. Or 7? A. Not to my recollection—I never sent a bill with a team as long as I am in business.

Q. Dealing with a buyer supposed to be solvent in the business, you would not think of sending your bills in before next morning, anyway? A. No, sir. That was my way of doing business; if I thought he was insolvent, I wouldn't send the goods at all—I was a member of the Board of Trade at that time. I testified in the replevin suit.

Q. Mr. Lynch, didn't you testify in that case that you sent
67 your clerk around to Ames' place of business the next morning, and that your wines still lay there? A. That is what I understood Mr. Wilson to say, if I recollect right. I think that is the report he made when he came back. I wouldn't say for certain.

Q. You understood so the other time, and so testified in the other case? A. I don't recollect now.

Q. You think it is so? A. It is now sixteen years ago.

Q. That is your present recollection? A. Yes, sir.

Q. That your wines were still there in Ames' store? A. Yes, sir.

Re-direct Examination.

It is the best of my recollection that my instructions were to deliver these fifty barrels of highwines at Mr. Ames' store and collect of Ames $1.07 per proof gallon. If Phillips & Carmichael had said I should take the wines to the railroad depot, instead of to Mr. Ames, I would have done it. They gave me no such instructions. My clerk, when he came back from Ames' place did not bring the money for the wines. He did not collect the money, for I collected myself of Phillips & Carmichael. My clerk was instructed to collect the money from Mr. Ames; he went down there for that purpose the next morning, and came back without it; and afterwards I collected the money from Phillips & Carmichael at the bank, and
it is the best of my recollection that I so collected it on the
68 same day, July 19th, the day after the wines were delivered.

Q. You spoke of your custom of not presenting bills the next morning, or for thirty days. Where you sold fifty barrels of

highwines with instructions to collect when you delivered them, would you in that case let it run 30 days without presenting a bill? A. No, sir.

Q. When did you give your instructions about this bill? A. I presume about half past nine. I don't think I got to the office before that.

Q. Then he couldn't collect that bill from Ames? A. My book-keeper couldn't collect it. I didn't go to Ames.

Re-cross Examination.

Ames didn't owe me anything for these wines; didn't owe my book-keeper; don't know whether my book-keeper saw Mr. Ames, that morning at half past nine, or ten, or at any time. There was in the course of business what is called a government coupon used in and about such proceedings in selling liquors. I can't tell exactly what it was. I know we used to send a coupon to show the taxes were paid on the goods. I think the distiller furnished those coupons. I don't recollect whether he got it from the collector's office, or kept a book at the distillery; it is a government coupon, the law is now suspended, but if I recollect right, the distiller put the number of the barrels and taxable gallons on the coupon to show that the tax is paid; my book-keeper done all that work, and I never pretended to know; in such cases when there is a sale of a lot of wines, there is made out the inspector's or the government certificate; the gauger's certificate was made out, I suppose, the
69 day the goods were inspected; they were inspected before delivery; this certificate is presented with the bill--also the coupon.

Q. Wasn't it the course of business in all such transactions that the certificate of the gauger should go with the bill not earlier than the next day after the delivery? A. Well, I don't know what other folks did, but I never did it until the next day.

The witness being re-examined by plaintiffs' counsel, further testified as follows:

I suppose the coupon or certificate went with the bill the next morning, when the book-keeper came down, because the inspection always went with the bill.

PLAINTIFFS' COUNSEL: It is customary when a man buys wines under a contract requiring him to pay cash on delivery, to ship those wines away before he has paid for them, without the knowledge of the seller. Is there any such custom as that?

(Objected to by defendant; objection overruled, and exception by defendant.)

A. I cannot tell what other folks done, but I have shipped goods

myself to other folks that bought them, and I might not send the bill for three or four days, or a week.

Q. Where you bought goods? A. I am not speaking about buying, I am speaking about selling.

Q. Where you sell goods to a man for cash on delivery, you are the seller, not the buyer? A. Yes, sir.

Q. Where you sell goods to a man to be paid on delivery, cash? A. Yes, sir.

70 Q. Is it the custom for a buyer to ship the goods away before he has paid you, before you have sent the coupon to him, without your consent? A. So far as my own business and my own transaction is concerned, I have sold goods to men, and I may not send the coupon or bill likely for three or four days, or likely five days. I may send him the inspection and the coupon, but not my bill.

Q. You would not collect promptly if you knew the men were good? A. Yes, sir.

Q. But suppose it is a sale for cash on delivery? A. My sales are cash on delivery.

Q. You were instructed to collect the money when you delivered the goods? A. Not immediately.

Q. Well, if you instructed the man that delivered them to collect the money when he delivered the goods? A. When I sold highwines, I sold for cash, and collected the cash when I thought it necessary for myself to do so.

Q. You always sold for cash? A. Yes, sir. That is when I sold highwines. I never sold highwines on credit.

Q. If you sold a man a bill of highwines for cash to be paid for on delivery, the ordinary course would be to send in due course the bill with the coupons, wouldn't it? A. Well, I do not recollect now, Judge, exactly.

Q. At that time, I mean, the coupon always went with the bill? A. We may send the coupon with the goods, and get our receipt, and then when I sent my bill send the gauger's certificate.

71 Q. Does the buyer of the goods ship and dispose of the goods before he gets the coupons? A. I don't know, sir. I don't recollect that.

Q. Don't the coupon show the inspection and payment of taxes, and wouldn't it necessarily have to go with the goods to show the men have a right to dispose of them? A. I think that was the rule at that time.

Q. Then it would not be in the ordinary course of business for a buyer who had bought goods that had been delivered to his place

of business, when the bill had not come, and the coupon had not come, to ship them and dispose of them? A. That I cannot answer, sir; what he does with them.

DEFENDANT'S COUNSEL: What is this coupon? To show there has been a sale? A. No, sir; it shows the government got their money.

Q. But these coupons are put on when there is a sale, aren't they? Are used? A. Well, I don't know at that time, Judge, I don't recollect very well now; I think there was a book that they used to have a coupon attached to that I put the numbers on.

Q. Highwines couldn't leave the distillery until they paid the taxes—is that it? A. Not with me; I always paid the tax.

Q. And when there was a sale they were to go to the buyer, then they had to pay the tax? A Pay the tax before they left the bonded warehouse, the tax had to be paid on them.

PLAINTIFF'S COUNSEL: Did you know of Mr. Ames carrying on business as a rectifier and dealing in goods here, after the
72 suspension of business by him, before mentioned by you? A. I don't recollect, sir, whether I did or not.

Q. You didn't hear of any such thing, did you, or know of any such thing? A. No, sir.

Q. I mean in that year, 1870? A. I don't know, sir.

DEFENDANT'S COUNSEL: Mr. Lynch, as you have answered the question both ways, I wish to ask the question and have it answered in one of these two ways. Did you know of Mr. Ames having been a prominent dealer in spirits and highwines here for the last ten years? A. Yes, sir; I answered in 1870, in July.

Q. And it may have gone back as far as 1871 or 1872? A. Well, it may; but that is not my recollection. When I made that answer I meant in July, about the 20th or 13th, or 19th or 20th, and after that—well, I couldn't say, but I know him to be in business now, distilling business and whisky business, for ten or twelve years, I guess.

PLAINTIFFS' COUNSEL: But there was three or four years after 1870 that he was not in business, to your knowledge? A. I can't say as to that.

Q. Do you know of his being in business here for three or four years after 1870? A. I couldn't say, sir.

Q. If it was true, you don't know he was here? A. No, sir.

Q. And you are in the same business yourself? A. Yes, sir.

73 WILLIAM C. GOUDY, a witness for plaintiffs, being duly sworn, testified as follows:

That he has been here in court while the witness, E. A. Otis, referred to the replevin suit brought in 1870, in the name and by the firm of Phillips & Carmichael, as plaintiffs, against the Michigan Central Railroad Company, and heard his reference to that suit. That he, Goudy, commenced that suit as attorney for the plaintiffs, and tried the case, which was tried so as to go to the Supreme court at its September term, 1871. I recollect that on the trial of that case of offering in evidence a paper purporting to be a contract for the sale of highwines, which paper I then had in my possession.

Witness was asked to examine a document shown him, purporting to be a transcript from the Supreme court, certified to by its clerk, under date of February 16, 1887, of the proceedings of record in that case, and his attention called to a copy of a document therein appearing, commencing on page 13, and witness testified that it is a copy of the paper he has just been asked about as having been in his possession and offered in evidence in that replevin suit; the original of that paper was in my law office at the time of the fire, on the 9th of October, 1871, and was burned up. I think the paper before me is a copy of that original paper. On the trial of that case, in May, 1871, I recollect of examining George S. Carmichael and Thomas S. Phillips as witnesses for the plaintiffs.

Q. Have you a recollection of the substance of their testimony on that occasion? A. Well, I remember the fact that they testified and some of the statements they made, independently of
74 any memorandum or reference to a paper, but I have looked at the paper I hold in my hand, and more particularly at an abstract of the record in the Supreme court, which I have had in my possession nearly ever since, and delivered to Gen. Hawley here about a year ago. That I have examined in connection with it, and from that my memory is refreshed as to what they did testify to. I have also examined this paper, compared it with the abstract, as to their testimony. Witness further testified that he had a knowledge of the abstract at or about the time it was made for the Supreme court, and used it in connection with the making of his argument in the Supreme court, and knows that said abstract was substantially correct.

Q. State, according to your recollection, whether the testimony as given in that transcript now in your hands, is a correct and accurate transcript of the testimony actually given by those two witnesses on that trial.

DEFENDANT'S COUNSEL: Simply to save the point, we will renew our objection, as we did in the case of Judge Otis.

PLAINTIFFS' COUNSEL: If they insist, the witness shall go through, and after seeing the document, state the testimony. I will ask him to do it. As a matter of convenience, I rather put the paper right in rather than duplicate the testimony.

The COURT: It may be some portion of the paper would be objectionable.

PLAINTIFFS' COUNSEL: We will read the paper.

The COURT: I supposed you would call the witness with reference to the point you wished to prove.

PLAINTIFFS' COUNSEL: I will prove the entire evidence, what they testified to, but when we read it, that part can be excluded which is objectionable.

75 DEFENDANT'S COUNSEL: I wish to save Mr. Goudy's time and Mr. Edsall's time, but I must make the objection and save the point. Then he can read what he wants to, when it is admitted.

The COURT: Objection overruled, and exception.

Go on.

A. According to my recollection this transcript of the testimony in the Supreme court in the case of Carmichael & Phillips, is substantially correct. That I can say on reading this over, and in connection with my recollection of what they testified to.

Q. You say substantially. Are there any particulars in which you say it is incorrect? If so, point them out? A. I merely want to say that I cannot say whether this is verbally accurate, but I know it is substantially correct.

Q. And the words used by the witnesses? A. I cannot say they are the exact words used by the witnesses.

Q. But substantially? A. Yes, I have no doubt it is, because it is a copy from that transcript, but still I couldn't say that from memory.

Q. You stated that you offered in evidence a paper purporting to be a contract commencing on page 13, I believe it is there. Before offering that, did you examine Mr. Carmichael with reference to that paper? A. Yes, sir.

Q. What, if anything, did he testify to with respect to that paper? A. He testified that paper was delivered to him by Mr. Ames at the time he made a contract for the highwines named in the contract.

Q. Did he testify anything as to the signature? A. My impression is there was no question raised about the signature at

76 all.

Witness was asked to read the questions there next before that paper was offered in evidence, and witness said—the question is asked here—"Is that Mr. Ames' writing? A. Yes, sir." That question was asked him and then the paper is offered in evidence. This question refers to this contract of June 9, 1870. Witness stated that he was connected with this litigation respecting the replevin suit in this court, and after it came back again. That he knows there was a final judgment in this court, in pursuance of the decision and mandate of the Supreme court.

Q. Do you know whether those high-wines were in fact returned, and if not, what was done in place of returning them? A. Well, all I know about that is what my clients, Phillips & Carmichael, told me what had been done with the high-wines. I think I gave them some advice about it, as to what they should do with them.

Q. Well, they sold the high-wines in the meantime? A. They so reported to me.

DEFENDANT'S COUNSEL: To Shufeld & Company? A. Yes.

PLAINTIFF'S COUNSEL: Do you know what they did with the proceeds? A. My impression is it was deposited to await the result.

Q. After the result was known, what was done? A. Well, the Bank of Commerce was satisfied as to its claim in some way. I don't know personally about that, though.

Cross-Examination.

Q. You don't know but what it was done by settlement and
77 adjustment of the whole matter? A. I don't know the particulars of that.

Q. Don't you know, Mr. Goudy, that your clients, Phillips & Carmichael, were sued for this same money by Moir & Company? A. I think they were.

Q. As for their money? A. I think they were sued for the money.

Q. Mr. Goudy, didn't your clients, Phillips & Carmichael, claim, and didn't they also testify that, in that replevin suit, they had never made a complete delivery of these high-wines to Mr. Ames? A. They did. That was the point.

Q. And therefore they were their wines, Moir & Company? A. The claim in the replevin suit rested on the theory that they had not been delivered.

Q. And they testified that they had not been delivered? A. They testified that they took them down to the place in the after-

noon or evening, and went there the next morning for the purpose of delivering them and collecting the money, and found that they had been shipped.

Q. Don't you know, Mr. Goudy, that your clients advised Conklin & Company, from whom fifty of these barrels of high-wines were obtained, to bring replevin for these wines, at your office? A. I think they did.

Q. And didn't you also, as attorney for Phillips & Carmichael, endeavor to get Conklin & Company to replevy these wines as theirs, Conklin & Company's wines? A. I don't know as I could hardly say I tried to get them to do it; I advised them that they might do it.

78 *Re-direct Examination.*

Q. You stated in your cross-examination that Phillips and Carmichael testified that they sent the wines down there to be delivered, and sent the next morning and the wines were gone? A. Yes, sir.

Q. Didn't they also testify that they found nobody there to collect the pay from? A. Yes.

Q. And that they didn't collect the pay? A. Yes. They found some laborer in charge, apparently in charge, and nobody else.

Q. Nobody else? A. No book-keeper, nor cashier, nor proprietor there.

Q. And the wines got away without their getting the money? A. Yes.

Q. Didn't they testify that they went there that afternoon—Mr. Phillips—twice to see to the delivery of the wines and collecting the pay, and couldn't find anybody there to collect from? A. I think Mr. Phillips so testified.

The COURT: What place was this? A. It was at Mr. Ames' place of business on River street.

PLAINTIFF'S COUNSEL: Didn't they also testify that both Mr. Carmichael—first Mr. Phillips and then Phillips and Carmichael—went the next morning after the day of delivery? A. One of them went first and then came back, so the testimony was, and then they both went down together. From there they went to
79 some other place, I don't remember where, and came to my office and directed suit to be commenced. Perhaps I ought to say in answer to these questions, that there was only a part of the barrels of high wines that were replevied in that suit. Part of them had been shipped and left the city. Mr. Phillips left immediately for Detroit, I think, for the purpose of replevying them there, and they were replevied there and suit instituted there, which followed subsequently the decision of this case.

Q. The decision of the Supreme court of Illinois in the case here? A. Yes, sir.

Q. And the ultimate decision of that replevin suit was the same as the one in Illinois? A. Yes, sir.

Re-cross Examination.

Q. They brought that fifty barrels back and sold them also? A. Yes, sir: they were replevied in Detroit. They were brought back and sold.

Q. Mr. Goudy, do you remember at what time in the afternoon, according to Mr. Phillips' testimony, he made, or caused to be made, an application for payment at Mr. Ames' place of business? A. I do not remember the hour. It was before the ordinary business hours of that time had closed. I think they ran business at that time from about sunrise to sunset.

Q. We have had testimony that these wines were delivered between five and six. It couldn't be before that? A. It was late in the afternoon, according to my recollection.

80 Q. If Conklin & Co. or any of them were requested to bring replevin, and also to collect payment if they could before bringing replevin, do you know when they were to make application? When they did make application for payment? A. No, I don't recollect that as to when. The time we talked about bringing the replevin was next day.

Q. And even that next day, you were still talking about Conklin & Co. bringing replevin? A. Well, I commenced this suit some time during the forenoon, I think, and it was in connection with that.

Q. All the government papers were not delivered, or deliverable according to the custom, until the next day, were they, Mr. Goudy? A. I only know from what was testified in that case.

Q. Wasn't it so testified in that case? A. Yes, sir.

Q. That the government papers in due course of business, would only come around the next morning? A. The testimony was that there was a custom in order to make a complete delivery, the government coupons showing the tax had been paid went with the highwines, and it was regarded as incomplete until the coupons were delivered.

Q. And these coupons had not been delivered? A. No, they had not, and our contention was for that reason the delivery was incomplete.

Q. And the inspector's certificate was not, according to that custom, delivered until the next day? A. I think it was not.

Q. Do you know of it being testified that the custom was as Mr. Lynch testified, that the bill ordinarily would go with
81 those papers, the bill for the wines, the bill for the payment of the price of the wines? A. Yes, sir.

PLAINTIFF'S COUNSEL: As I understood, it was testified that the wines were shipped away by Ames, before the coupons and the bill had been sent and the money collected? A. Well, before—I couldn't say that. My recollection is that Mr. Phillips went down there in the afternoon. Whether he went to collect the money then or not, I don't recollect, but I think it appeared they had been shipped away as early perhaps as 8 o'clock or before in the morning. I recollect that Mr. Ames went to the bank with his bill of lading at perhaps half-past 8 o'clock.

DEFENDANT'S COUNSEL: In the morning? A. When he got his money on the bill of lading and they had been shipped before that.

Q. The bank didn't open until 10, and Mr. Bell, the cashier, testified it was after the opening? A. Yes, but the testimony in that case was that he got it by half-past 8 o'clock, and we made the point that that showed it was irregular and fraud.

Q. Mr. Edsall has proved it different in this case, that it was after banking hours? A. It was before, in that case.

PLAINTIFF'S COUNSEL: He is talking about shipments, and you are talking about what took place in the bank.

DEFENDANT'S COUNSEL: Do I understand you to say that these drafts were cashed about half-past 8? A. I understand it appeared in that case that Mr. Ames was at the bank with his
82 bill of lading by half-past 8 o'clock. As to the precise time he got the money, I do not recollect.

Q. It was not testified in that case that he got the money at half past 8 o'clock? A. No, I don't remember that.

Q. It was not testified in that case at what time he did get the money, or his bills of lading? A. No, I don't remember that. He got his money before we began suit, which was somewhere about 11 or 12 o'clock. Something like that.

Plaintiffs then offered in evidence and read the deposition taken in this case of William W. Bell, as follows:

Deposition of WILLIAM W. BELL, taken before Hattie A. Shinn, a notary public in and for the county of Cook and State of Illinois, in a certain cause now pending in the Superior court of Cook county, in the State of Illinois, wherein Robert Moir, John C. Nicol and James Peterson, late partners, etc., are plaintiffs, and Wilson Ames is defendant, on the 7th day of March, A. D. 1887, at 11 o'clock in the forenoon, at room 34 in the Montauk block (115 Monroe street), in the city of Chicago, in said county of Cook, in pursuance of the foregoing stipulation and notice.

There were present on said examination Messrs. Edsall & Edsall, as attorneys for plaintiffs, and W. H. Barnum, Esq., and John G. Reid, Esq., as attorneys for defendant, Wilson Ames.

Said witness being first duly sworn, testified as follows:

83 *Direct Examination by Mr. Edsall.*

Q. What is your name, age, residence, and occupation? A. William W. Bell; forty-four years old; live at Bushnell; am a banker.

Q. In what county is Bushnell, how far from Chicago, Illinois? A. In McDonough county, about 200 miles from here.

Q. Where did you reside, and in what business were you engaged in the months of June and July, 1870? A. I lived in Chicago, and was teller of the National Bank of Commerce of Chicago.

Q. Who were then the president and cashier of that bank? A. B. F. Hadduck was president, and Edwin Maynard was cashier.

Q. Do you remember the fact of your deposition being taken on or about May 8, 1871, in a replevin suit for fifty barrels of high-wines, then pending in the Superior court of Cook county, Phillips & Carmichael, plaintiffs, and the Michigan Central Railroad, defendant; and if so, state before what officer said deposition was taken, and who were present at the time?

(Objected to as immaterial.)

A. I remember the deposition made in May, 1871, in that case.

Q. Before what officer? A. Before a notary public.

Q. Do you remember who were present at the time? A. Goudy & Chandler, Edwin Maynard and E. A. Otis. I think that deposition was taken before Edwin Maynard, who was also a notary.

Q. Was your deposition again taken in the same case on or
84 about July, 1872? If so, state before what officer said second deposition was taken, and who were present at the time?

(Objected to as immaterial.)

A. Yes, sir, a second deposition was taken in July.

Q. What year? A. July, 1872. That was before George Chandler, a notary public. I think Goudy and Chandler and E. A. Otis were present then, and I think Mr. Maynard, but I am not sure about him.

Q. At the time of the taking of your first deposition before Edwin Maynard, notary public, were any papers presented to you and identified by you on such examination as Exhibit A and Exhibit B? A. Yes sir.

Q. Please state what paper, or series of papers constituted Exhibit A on said examination and referred to in that deposition?

(Objected to as incompetent in this case to prove the character and contents of the deposition of the still living witness given in a former case.)

A. Exhibit A consisted of a draft of Wilson Ames for twenty-eight hundred dollars ($2,800.00). Shall I describe the draft?

Q. Yes, describe the draft. A. A draft of Wilson Ames for twenty-eight hundred dollars, to the order of Edwin Maynard, cashier, dated July 18, 1870, drawn on W. S. Miller & Co., 72 Broad Street, New York, with a bill of lading attached and protest of the draft; the bill of lading for fifty barrels of highwines.

The bill of lading for fifty barrels of highwines consigned to
85 W. S. Miller & Co., New York, by Wilson Ames of Chicago, to be forwarded to the consignee or owner at New York, and to the next company of carriers, if the same are to be forwarded beyond, for them to deliver at place of destination.

Q. Please state what paper or series of papers constitute Exhibit B referred to in your deposition taken before Maynard? Describe them fully.

(Objected to.)

There is no proof as yet of the destruction or loss of the original, or if they were, or if they shall be, then full copies if practicable, shall be given rather than a resume of their contents? A. Exhibit B consists of a draft of Wilson Ames of Chicago, dated Chicago, July 18th, 1870, for twenty-nine hundred dollars ($2,900.00) to the order of Edwin Maynard, cashier, drawn on W. S. Miller & Co., 72 Broad street, New York, and a protest of the draft for non-payment; signed A. R. Rogers, notary public, and a bill of lading.

Q. Give the date of the bill of lading and describe it, stating its contents?

(Objection same as before.)

A. A bill of lading dated Chicago, July 19th, 1870, consigned

to W. S. Miller & Co., New York, from Wilson Ames, fifty barrels of highwines to be transferred over the line, and delivered in Chicago here, to be forwarded to the owner or consignee at New York, and the next consignee or carriers—the same as before.

Q. What company or corporation purported to issue this bill of lading? A. It seems to be the Michigan Central Railroad; it is headed, "Grand Central Route, Michigan Central Railroad,
86 Blue Line, Freight Contract," signed, J. W. Barry, Sr., for Thomas Hopes, general freight agent.

Q. What was the date of the bill of lading forming part of the Exhibit A? A. July 18th, 1870.

Q. And the bill of lading forming part of Exhibit B is dated July 19th, as I understood you? A. Yes, sir, the second is dated July 19th.

Q. Please state when you first saw the drafts and bills of lading referred to by you as Exhibits A and B, and where you first saw them? A. I think it was the morning of July 19, 1870, at the National Bank of Commerce.

Q. In what city? A. In the city of Chicago, at the teller's window.

Q. State who, if any one, presented those papers at the teller's window at that bank? A. They were offered for deposit for the credit of Wilson Ames either by Mr. Ames himself, or his bookkeeper, Mr. Kendall. When I made the former deposition my impression was that it was Mr. Kendall, but it might have been Mr. Ames.

Q. Were the bills of lading and drafts presented together, at the same time? A. I think they were.

Q. Were they fastened or attached together then, at that time? A. I think so, they usually are.

Q. About what time in the day were they presented at the bank. A. Shortly after the bank opened for business which was 10 o'clock according to my recollection, and my former deposition; I looked the matter up on the books of the bank, at the time.
87 Q. What was done by the bank upon the presentation of these drafts and bills of lading? A. They were credited to Mr. Ames as a regular deposit, less exchange, I presume.

Q. Do you know of any check being presented at the same time or very soon thereafter, if so, by whom? A. Yes, sir. Shortly afterwards a check for six thousand dollars ($6,000.00) was presented for certification.

Q. Drawn by whom? A. Wilson Ames.

Q. On this bank? A. Yes, sir.

Q. Go on and state fully what was done with that check? A.

The check was payable to the order of some one whose name I do not recall, and did not at the time. The check was good on the books of the bank and was certified, and shortly after that it was presented for payment by this stranger, and Mr. Ames accompanied him, and identified him as the proper party.

Q. As the proper party to pay the check to? A. Yes, sir, he wanted currency and I paid it to him.

Q. Were you then acquainted with Wilson Ames? A. Yes, sir.

Q. And you stated that he identified the man to whom the check was paid, as the proper party? A. Yes, I stated so in my former deposition, and as the facts were very fresh in my mind at that time, I have no doubt of it.

Q. In order to make up the amount to pay this check, state
88 whether the proceeds of the discount of these drafts was necessary to make up the amount? A. Yes, sir, it was. The check for the amount was a little larger than the total amount of the two drafts.

Q. How long after the drafts were discounted was it that this check was presented for certification and paid? A. Only a little while.

Q. Give it in something definite? A. I should think within an hour. I state this from my former deposition, when the facts were fresh in my mind. I am perfectly satisfied it is perfectly correct.

Q. Were these drafts referred to by you as forming parts of Exhibits A and B paid by the drawee in New York? A. They were not. They were returned unpaid, and protested for non-payment.

Q. Is the National Bank of Commerce still in existence, or has it been closed up? A. It has closed up, retired from business voluntarily.

Q. Have you seen the papers referred to as Exhibits A and B taken before Edwin Maynard, since that deposition was taken, or since the Chicago fire of 1871? A. I could not say whether I have or not. I have no recollection of having seen them since then.

Q. Since what time? A. Since the first deposition was taken.

Q. Do you remember whether that was before, or after the Chicago fire of 1871? A. The first deposition was before the fire; the second one was after the fire. There is nothing in
89 the second deposition to indicate that they were there at that time.

Q. Did you not, in your second deposition, refer to the certified transcript of your first deposition?

(Mr. Barnum objects to inquiries about former depositions.)

A. The second deposition refers to a certified copy of my former deposition.

Cross-Examination by Mr. Barnum.

Q. Mr. Bell, at the time of the presentation of these bills of lading and drafts, referred to in your present deposition, how long had you been in the same position in that bank? A. About six months then.

Q. During all that time were you acquainted with Wilson Ames and his business in the bank? A. My recollection is that Wilson Ames had not been in business for himself that long. The firm had formerly been Miller, Ames & Co. Wilson Ames succeeded to that company, how long I can not remember.

Q. Don't you remember that Wilson Ames, in the course of his business immediately prior to this deposit of these bills of lading and these drafts with your bank, had been regularly presenting such drafts and bills of lading or merchandise, and discounting drafts in the same way? A. It has been so long, Judge, I have no distinct recollection of anything, but in the ordinary course of business, I should think he had been.

Q. He had a bank account there, didn't he? A. Yes, sir.

90 Q. And at different times immediately prior to this, he had different amounts standing to his credit, and sometimes a considerable amount? A. He had an account there, but I could not state whether it was great, or how the amount stood.

Q. You don't remember—this was some seventeen years ago, at least? A. Yes, sir; he probably had six thousand dollars to his credit when I certified the check.

Q. And you would not be able to say he hadn't had as large a sum as that before the drafts were discounted? A. No, sir.

Q. Or even a larger sum? A. I could not say anything about it.

Q. His credit was good with the bank at the time, wasn't it? A. Well, I don't know that I could answer that.

Q. Before he presented these bills of lading? A. Why he certainly had some credit there, but how good his credit was, I could not say.

Q. You don't remember now anything in the nature of impeachment of his credit before that time, do you, with that bank? A. No, sir, I don't think there was; I don't remember.

Q. You don't now remember of any circumstance whatever affecting the solvency of Wilson Ames before that time, do you,

with your bank? A. He was considered perfectly solvent as far as I knew.

Q. Mr. Bell, speaking with reference to your experience as banker and teller, before and since that day, do you say there
91 was anything unusual in the circumstance of the drawer of the check which had been certified in favor of the third party, bringing such third party along to the bank to be identified by him, in itself or of itself? A. It is rather rare.

Q. Does it occur in your business? A. Yes, sir.

Q. Where a man may be unknown to the bank, of course known to the drawee of the check, you don't think there is anything unusual in being identified by the drawee of the check? A. It is not so unusual as to excite suspicion ordinarily.

Q. I suppose a great many persons come with certified checks to your counters that require identification, don't they? A. Yes, sir.

Q. The discount on these drafts was the same as in usual cases, wasn't it? A. The usual rate of discount was charged, I presume, I don't remember what it was.

Q. Without asking you to give the contents of any document, or produce or again refer to any document that you may have consulted during this examination in chief, I will ask you simply to state whether or not you could have given the testimony you have given here to-day as a matter of memory, and without consulting any papers you have consulted? A. I could have given the substance; I could not have given all the details; I remember the facts very well; have often spoken about it.

Q. At the time referred to, your bank did business with other distillers, and other distillers had accounts there, and made
92 deposits of bills of lading and drafts against the same? A. We had accounts with other people doing the same kind of business.

Q. It was quite usual for bills of lading and drafts drawing against the goods wasn't it? A. Yes, sir.

Q. Do you know from your familiarity with the bank, at and prior to that time, for how long a period Mr. Wilson Ames, or any firm to which he belonged, had been doing banking business with your bank—with that bank? A. They had been doing business for some time—I couldn't state exactly how many months without referring to the books. I went there as teller in January preceding, and the firm that Wilson Ames succeeded may have had an account there at that time, or may have opened it afterwards.

Re direct Examination by Mr. Edsall.

Q. Do you intend to swear that Wilson Ames had six thousand dollars on deposit there, in addition to the proceeds of these drafts discounted, in the month of July, the 19th day, 1870? A. No, sir.

Q. But the proceeds of the drafts made up the amount? A. I stated that he probably had six thousand dollars ($6,000) to his credit when the check was certified. If he did, it was the proceeds of these two drafts. As a matter of business if he was a good customer, and he lacked a hundred or two hundred dollars, we would have paid the check, perhaps.

93 Q. Do you remember the fact of hearing of Wilson Ames' failure immediately after this?

(Objected to as immaterial and irrelevant.)

A. I heard of it shortly afterwards.

Q. How soon afterwards? A. I couldn't state, it may have been one day and may have been a week; I had not heard of it at the time I discounted the drafts.

Re-cross Examination by Mr. Barnum.

Q. Are you able to state positively, as a matter of memory, Mr. Bell, or positively in any manner, that there wasn't still a balance to the credit of Mr. Ames after the payment of this certified check? A. I cannot state how the account was on the books after the check was paid.

Q. Then you couldn't state that he had not some remaining funds there? A. No, sir. If he had any balance it was only a small amount; he may have had a small balance there.

Re-direct Examination by Mr. Edsall.

Q. When you say small balance what do you mean? How much?

(Objected to unless he can state fully, without conjecture.)

A. My recollection is, that the six thousand dollar check
94 that he drew was for all of the amount of his balance at that time.

By. Mr. EDSALL: Please state how the bill of lading forming a part of Exhibit "A" referred to by you was signed?

(Objected to by defendant because the deposition has been already closed, and adjournment only had to type-write it, and also because it is not properly re-direct.)

A. It is signed J. W. Barry, Sr., for Thomas Hoppes, general freight agent.

W. W. BELL.

Defendant by his counsel stated that we object to all this testimony on the same grounds as we objected to the testimony of Judge Otis and Mr. Goudy, that in proving fraud it states matters which do not relate to the making of the contract, but to the delivery of the goods and the shipment after the contract was made.

(Objection overruled by the court, and exception by the defendant.)

EDWIN MAYNARD, a witness for plaintiffs, being duly sworn, testified as follows:

During the summer of 1870 I was cashier of the National Bank of Commerce of this city; B. F. Haddock was president of that bank, and W. W. Bell was teller. Mr. Haddock is dead. The bank went into voluntary liquidation and closed up. While I was cashier of that bank in June and July, 1870, I knew Wilson Ames. He had an account at that bank in June and July of that year; I recollect the last transaction he had in the bank in the way of making deposits or drawing checks.

95 Q. State what it was?

COUNSEL FOR DEFENDANT: This goes in subject to our objection. We object to a transaction subsequent to this paper and subsequent to the purchase of these wines.

The COURT: Well, he may answer.

A. It was a deposit of s ome drafts, two drafts, I don't recollect whether they were both deposited at the same time, or whether one was deposited at one hour and the other at another, but they were drafts that were drawn against some shipments of high-wines to New York. One was for 2,800 dollars and the other for 2,900 dollars. That was the transaction, depositing those drafts and having them placed to his credit.

Witness further testified that bills of lading for those shipments of wines, accompanied the drafts, were attached to them; cannot state the date of that transaction; think that was the last deposit he made in the bank; think that was the last transaction we had with him; heard of his failure in business after this deposit, think it was the next day after; as I remember about it, this deposit was the last transaction before his stopping business. I was examined as a witness in a replevin suit brought by firm of Phillips & Carmichael against the Michigan Central Railroad Company for fifty barrels of these wines; I don't remember when it was tried, but I remember the case and that I was a witness, and was examined in regard to this same deposit of those drafts; I cannot tell who presented these drafts at the bank for discount. Mr. Ames sometimes deposited

himself and sometimes his book-keeper. Which one it was that
96 brought these in I cannot say. I don't know anything about a check being drawn for the amount embraced in those drafts, and perhaps a little more, soon after; as cashier, I would not necessarily have anything to do with such a check—the teller would be the man to attend; this replevin suit concerning the wines was finally determined in favor of the bank; the drafts which Ames had discounted at the bank, were returned protested—they were not paid by any one.

DEFENDANT'S COUNSEL: The wines did not go on? A. The wines were stopped on the way.

PLAINTIFF'S COUNSEL: After this suit was disposed of, was the amount of the drafts paid by any one; and if so, by whom, to the bank? A. I cannot say whether the amount of the drafts was paid. The award, whatever it was, of that case against Phillips & Carmichael was paid to the bank. Phillips & Carmichael paid a sum of money, whatever it might have been, I do not remember the amount.

Q. The amount that was the proceeds of the sale of the wines? A. Yes; practically the amount of these drafts.

Q. That Phillips & Carmichael paid to the bank, after the replevin suit was finally determined in this court against them? A. Yes, sir.

Q. They paid it to the National Bank of Commerce on account of the claim arising by virtue of that suit? A. Yes, sir.

Q. And the National Bank of Commerce claim was based on those drafts? A. Yes, sir.

97 *Cross-Examination.*

Q. You stated that the amount of money paid over was practically the amount of money due to the bank of these drafts, didn't you? A. Yes, sir.

Q. Was it more or was it less? A. Well, I cannot tell from recollection, and I do not know whether I can find the entry showing just the amount paid.

Q. Then you really do not know whether it was more, or whether it was less? A. No, sir; I do not. It was in settlement of the suit according to the verdict, whatever it was.

Q. This was paid from the proceeds of the sale, private sale to H. H. Shufelt & Co. of the wines in controversy, was it not? A. I do not know, sir, how it was paid.

Witness, on his further cross-examination, testified that he has no recollection of ever knowing anything about the sale of the

highwines to H. H. Shufelt & Co., or about the deposit in bank of the money received on such sale; that he had known Wilson Ames as banking at that bank prior to that transaction, only a short time —should say two or three months. I had only been here a short time myself.

Q. Did he have a large bank account at your bank from time to time? A. Well, it was not a very large account. He had drafts larger than this one at times that he deposited.

Q. There were drafts larger than this one at times? A. Yes, sir.

98 Q. Was it a frequent occurrence that he drew drafts against bills of lading, against shipments? A. My memory would be that he did not very often make shipments of highwines in large quantities, usually they were smaller amounts.

Q. He did sometimes, did he? A. Well, I cannot say whether he ever did or not, Eastern shipments.

Q. Did shippers of highwines generally, who banked with you, draw drafts against shipments? A. Usually; yes, sir.

Q. It was a customary and common transaction, was it not? A. Oh, yes.

Q. Do you not remember that on the day previous to the day you have been asked about by Gen. Edsall, Mr. Ames drew drafts against another large shipment of fifty barrels? A. Not one of these two, do you mean, sir?

Q. No, sir. Neither one of these two, a different transaction entirely? A. I do not know, sir. I do not recollect anything at all about it, and I have not looked to see if I could find anything about it.

PLAINTIFF'S COUNSEL: That is nothing that I examined about, I do not care to be objecting, but I have not examined about any other drafts.

DEFENDANT'S COUNSEL: I want to show that there was nothing phenomenal, exceptional or suspicious about this transaction;

99 that it was the same course that had been pursued all the time.

The COURT: I think he may answer about that.

Q. You do not remember, Mr. Maynard, how that is? A. No, sir.

Q. You were cashier of the bank at that time? A. I was.

Q. Was Mr. Ames' credit with the bank good then and theretofore? A. It was good at that time.

Q. He had the reputation with you of being a solvent man? A. Yes, sir.

Q. A successful business man? A. Yes, sir.

Witness testified that he knew both Phillips and Carmichael; do

not remember to have talked personally with either of them in reference to the bank claim against these wines; think that matter was attended to by the President altogether, who is now dead—died in 1871. Think about December 1st. This transaction was under his charge more particularly.

OLIVER H. HORTON, a witness for plaintiffs, being duly sworn, testified as follows:

I had connection with that replevin suit of which the former witnesses have testified, and appeared formally for the Michigan Central Railroad Company, but in fact for the National Bank of Commerce of this city; I participated in the trial of that case; it subsequently went to the Supreme court. I took it there for the side I represented. I had a part in the preparation of the
100 abstract, and the briefs for the Supreme court—also with the bill of exceptions which was made a part of the record sent to the Supreme court in that case. Mr. Goudy, on the part of the plaintiffs in that suit, offered in evidence a paper purporting to be a contract in reference to the sale of highwines. The contract was with a man by name of Ames.

The same transcript from the Supreme court, already referred to by other witnesses, was handed witness and his attention called to the document commencing at the bottom of page 13 thereof, and after witness had examined same he was asked:

Q. Will you state what if anything to your knowledge and recollection that is a copy of?

DEFENDANT'S COUNSEL: We make the same objection here that we made before to the testimony.

The COURT: He may answer:

A. I believe it to be a copy, sir, of the contract introduced in evidence upon the trial of that case by the plaintiffs.

The witness testified further that he had examined hurriedly and since he came into the room, the portions of that transcript which purport to contain the testimony given by the witnesses George S. Carmichael and Thomas S. Phillips; probably there were things stated by them that I cannot from recollection recall or state; but I think I could give the general substance of it. By reference to that paper, or any other paper that I know to be correct. I think I can give the substance of their testimony on that occasion. I think that the testimony as contained in the transcript, purporting to be the testimony of George S. Carmichael and Thomas S. Phillips, is a literal transcript of their testimony as taken by a stenographer

101 at the time. I think that independently of this transcript, I can recollect the substance of their testimony. I was quite interested in the case, so that it is pretty well fixed in my memory. I think that I, in connection with Judge Otis, prepared the abstract in that case in the Supreme court.

* * * * *

102 PLAINTIFF'S COUNSEL: The contract I will state, is embraced right in the body of Carmichael's testimony, and might as well be read together as it stands there. We will commence with reading George S. Carmichael's evidence on page 13, and read from said transcript as follows:

"GEORGE S. CARMICHAEL, one of the plaintiffs, having been duly sworn, was examined in chief by Mr. Goudy, and testified as follows:

"Q. Are you one of the plaintiffs in this suit? A. I am.

Q. What is the style of the firm? A. Phillips & Carmichael.

Q. Who are your partners? A. William M. Phillips and Thomas S. Phillips.

Q. Have you any knowledge in regard to the contract made between Robert Moir & Co. and Wilson Ames for some highwines? A. Yes, sir.

Q. Please look at this paper and state whether or not that is the contract?

103 (Handing witness paper.) Is that Ames' writing? A. Yes, sir.

The counsel for the plaintiffs then offered in evidence the contract dated June 9, 1870, as follows:

* * * * *

104 "Wilson Ames, successor to, office of Miller, Ames & Co., successors to Edwards and Crosby, and Edwards & Co., distillers of alcohol, spirits and whiskies, Nos. 13 and 15 River street, Chicago.

"Contract. CHICAGO, June 9, 1870."

"I have this day bought of Robert Moir & Co., one hundred

107 (100) barrels highwines, 'iron bound,' at one dollar and seven cents ($1.07) per proof gallon. The conditions of sale are as follows:

The buyer can call from first July to twentieth of same month by giving three days' notice, and if not called for by the 20th July the seller has the privilege of delivering up to the end of July by giving three days' notice; to be delivered in fifty barrel

108 lots. To insure the fulfillment of this contract a margin of three hundred dollars will be put up by both parties. (Revenue stamp canceled.)

(Signed) WILSON AMES."

Then it goes on:

"Question. That notice or call, if any, was made under that contract—"

COUNSEL FOR DEFENDANT AMES: One moment, please. I move to exclude that paper on the ground that it shows upon its face that it was not binding upon both parties mentioned at all. It was merely a privilege secured to Moir & Company, which they could avail themselves of or not, could deliver or not, and could call for pay or not. It was not binding when it was made.

The COURT: The motion is overruled.

(Exception by defendant.)

PLAINTIFF'S COUNSEL: (Reading.) That notice or call, if any, was made under that contract as far as you know? A. Three days' notice.

Q. Was the call or notice given under that contract? A. Yes, sir.

Q. By whom? A. By Ames.

Q. To whom? A. To our firm in the name of Moir.

Q. Were you acting at that time in the name of Moir? A. Simply as his agent. He was selling wines as a distiller, and we were acting as his agents to see the contract carried out here. He had his office in our office, and when he was not here we acted for him.

Q. Were you acting for compensation, or gratuitously? A.

109 Well, in this transaction we did not expect any compensation. We were merely carrying out the contract which he had made individually, and we were doing it as a matter of favor."

Q. The call, you say, or notice, was given to you? A. Yes, sir.

Q. For Moir? A. Yes, sir; Mr. Moir directed Mr. Ames to make the call on us, provided he was not here at the time when he made the call.

Q. What steps did you take to answer the call? A. At the time the call was made I told Mr. Ames that Mr. Moir, who was a distiller, had had his wines burned up, that he intended to deliver on this sale, and that if he required us to deliver the wines under the sale, we would have to go in the market and buy them and deliver them; but rather than do that we would settle with him on the market price, and I told him that we would even allow him from a quarter to half a cent rather than go into the market and

buy them. He replied that he wanted to rectify these wines, and that he required us to deliver the wines.

Q. How much was called for under the contract? A. One hundred barrels was called for.

Q. What was the business of Moir & Co.? A. They were distillers at Oquawka, Illinois.

Q. Where was your office to which you have referred? A. Our office was at No. 27 Exchange Place in this city.

Q. Now you may proceed. You have told what Mr. Ames said to you. What further steps did you take to supply the highwines? A. We went into the market and gave an order to a broker to buy on account Moir 100 barrels of wines—Mr. 110 Ford. That was on the 18th. He called for them, I think, on the 15th, to be delivered on the 18th of July, 1870. And on the 18th on 'Change in the morning we gave an order to Mr. Ford to buy 100 barrels of wine. During 'Change Mr. Ford stated that he had made arrangements for the purchase of them—fifty barrels from Conklin & Brother, and fifty barrels from Thomas Lynch & Co.

Q. Did you, personally, see either or both of these parties? A. I saw both of the parties after I was notified that they would sell each of that fifty barrels and stated—

Q. You need not tell the conversation. Did you make a contract for the purchase? A. Yes, sir.

Q. With whom? A. With Conklin for fifty barrels—J. C. Conklin & Co., and with Thomas Lynch & Co., for fifty barrels, to be delivered that day.

Q. What was the description of the property you bought from Conklin Bros.? A. They were iron-bound barrels, distilled by Conklin here, Conklin & Bros., and marked as being distilled by them.

Q. Was it marked by the firm or by one of them? A. Well, I think that—

Q. Let me show you a coupon in connection with them. (Handing witness coupon.) A. Yes, sir; this is a lot of wines bought. This is the coupon which described the lot of wines bought of Conklin.

Q. Were the barrels of highwines purchased of Conklin and Lynch the same that were replevied by you and the other 111 plaintiff in this suit? A. They were.

Q. Which lot was replevied in this suit? A. The fifty bought of Conklin.

Q. Did you receive the highwines of the sheriff? A. Yes, sir.

Q. On the 18th of July, at the time these highwines were pur-

chased by you to be delivered to Ames, what was your information or knowledge with regard to his circumstances? A. We didn't know anything about the responsibility of Mr. Ames. We only knew that he was engaged in business here.

Q. You say you supposed him to be solvent? A. We supposed him to be solvent.

Q. Was there any facts came to your knowledge that led you to doubt the solvency at that time? A. There was not until after the wines were purchased.

Q. When did you first get any information to lead you to think he was insolvent? A. On the next day, the 19th.

Q. What information did you get then—I will ask you whether he was solvent or insolvent at that time? A. He was insolvent, we ascertained.

Q. Did he cease doing business—or first I will ask you what business he was engaged in? A. He was engaged in the wholesale liquor business and rectifier of spirits.

Q. Did he cease doing business. and if so, when? A. He did so, on the following day, on the 19th; the sheriff took possession of his establishment on River street.

112 Q. Did you know anything in regard to his receipts and other shipments of other high-wines then, that is, about that time? A. Yes, we knew that he shipped—

(That seems to be objected to; that is all there is of that answer.)

Q. Now, you may state what knowledge you obtained in regard to his solvency, how you obtained it, and what it was? A. Well, we went to Ames' place of business the next day. We were there early in the morning, about 9 o'clock, to tender these wines and collect for them, and we could not find him. We asked for the book-keeper and a man there—

The COURT: Who are we? Do you mean yourself personally? A. I was there personally. There was a man sitting in the office. He said he didn't belong there; I asked him for some one in charge, and he could not direct me to anybody in charge. And I went back into the back end of the store and found a laborer there handling wines; he was there receiving or delivering to a dray, and I asked him where Ames was, and he said he couldn't tell where he was; he hadn't been there that morning. I asked him where he lived, and he said he didn't know; that his family had gone east a few days before that, and Ames was living at some hotel; he couldn't tell which hotel; and I asked him about the book-keeper, and he said the book-keeper was not there. Then I asked him where the wines were—this lot of wines. He couldn't give me any

information about them, but he said that they had been shipping wines the afternoon previous and that morning, and that they
113 might have been shipping that lot. I asked him by what road they had been shipping, and he said by the Michigan Central. Then we went to the Michigan Central and found this fifty barrels of wines which we bought of Conklin at the depot. We came back from there in a few minutes, and the sheriff was then in possession of Ames' store.

The officers there had taken charge and had closed up the store and were in possession. That I think was between ten and eleven o'clock. We tried to find Ames on that day; we could not find anything of Ames at all.

Q. Has he ever been in business or resumed business since? A. I understand not.

Q. At what time of day was this suit commenced? A. This suit was commenced immediately on coming from the depot, between 10 and 11 o'clock.

Q. You said you found the fifty barrels purchased of Conklin in the depot. Where were they? A. They were in a car at the depot, loaded in a car.

Q. Was you informed, or did you learn before this suit was commenced, of any claim to these wines by any other person than Ames? A. I didn't know anything about any other claim.

Q. What information, or what knowledge rather, have you in regard to the delivery of wines on the 18th of July last at Ames' store, other than these? A. Parties have told me that they delivered—

Q. You need not tell what others told you. Didn't you see other wines there? A. Yes, I saw lots of wines there at the time I was there.

114 Q. Were you there on the 18th? A. I was not there on the 18th.

Q. The morning of the 19th? A. The morning of the 19th. The floor of the store was covered with wines about as thick as you could roll the barrels together.

Q. Did the firm of Phillips & Carmichael pay Conklin Brothers for the fifty barrels bought of them? A. They did.

Q. For whom did you make the payments? A. We made the payment for Mr. Moir, and he paid us. We drew a draft on Mr. Moir for the amount we paid, which draft he paid.

Q. Did you receive pay from Ames? A. We never have received anything from Ames on account of this, except the margin that he deposited in our hands when the contract was first made.

Q. What was the contract in regard to the payment, if any-

thing different from the written contract which had been produced here? Was there any other arrangement made? A. No other arrangement made.

Q. What was the terms of payment? A. Cash on delivery.

Judge BARNUM: We object to that question and answer, because if this is a written contract it will have to speak for itself.

Mr. EDSALL: We concede that the court will construe the contract.

Judge BARNUM: I don't concede anything; I merely make this objection. You concede that it ought to be stricken out, do you?

115 Mr. EDSALL: He is just asked the question, if there was any other agreement than that written in the contract, and he says there was no other.

Judge BARNUM: I object to the question and answer, and move that they be stricken out on the ground that the private opinion of the witness as to what terms the sale was made upon is not admissible under any circumstances. It calls for his opinion.

Mr. EDSALL: You concede that the written contract is a question for the court to construe?

Judge BARNUM: We do not, necessarily.

Mr. EDSALL: Well, if you do not concede that it is for the court to construe, I shall insist upon its being in there.

Judge BARNUM: I say that the witness cannot be permitted to say what in his opinion is the effect of the contract, whether it is verbal or written.

(Motion denied by the court, and exception by defendant.)

PLAINTIFF'S COUNSEL (reading): Did you give directions to any person to make collections? A. We did. We gave directions to Mr. Conklin on his fifty, and Mr. Lynch on his fifty, to collect for them at Moir's price when they delivered.

Q. Did you receive anything through Conklin Bros.? A. Nothing was paid to either one of them.

Q. Did you receive the highwines that were taken by the officer under the replevin writ in this case? A. We did.

Q. What day was that? A. On the 19th.

116 Q. The same day the suit was commenced? A. The same day the suit was commenced.

Q. What disposition was made of the highwines? A. We sold the wines to H. H. Shufelt & Co., and delivered them to him, and delivered the coupon.

Q. Won't you please look at this coupon and see if this is the one (handing witness coupon)? A. This is the coupon describing the wine; and this coupon we received direct from Mr. Conklin and delivered it to Mr. Shufelt.

Q. When did you receive that from Mr. Conklin? A. We received it on the 19th and delivered it to Mr. Shufe't the same day.

Q. I observe that that was filled up J. C. Conklin and Bro., and then Wilson Ames, and then an erasure, and H. H. Shufelt & Co. written in; can you explain that? A. The wines are manufactured by J. C. Conklin, who is one of the firm of Conklin & Bro., in Rock Island, and shipped direct to their house here, and the coupon is filled out in the name of their house here. When we purchased it and directed them to deliver to Ames, they erased the name of the house here and put in Ames' name; but as the coupon was not delivered at all, and we called for the coupon to deliver it to the purchaser of the wines, Mr. Shufelt, they erased Wilson Ames' name, and put in the name of the purchaser, H. H. Shufelt & Co., and passed the coupon over to us, and we delivered it with the wine to Shufelt.

By Mr. GOUDY: We will offer this coupon in evidence,
117 dated Rock Island, Ills., July 15th, 1870, as follows:

No. 16. H. H. Shufelt & Co., Rock Island, Ills., July 15th, 1870. Bought by from J. C. Conklin, of Rock Island, State of Illinois.

50 packages highwines, containing Wine Gln. 2109; Proof Gln. 3226.77, and distilled by J. C. Conklin, 4th Distr. of Ills. Gauged by C. S. Gorman, U. S. G., 4th Distr. of Ills.

Serial Nos. of packages, 119 to 168, inclusive. Serial Nos. of tax paid stamps, A. 141269 to A. 141300 and A. 141328 to A. 141345, inclusive. Serial Nos. of rectifiers' or warehouse stamps, B. 460519 to B. 460568, inclusive.

Serial Nos. wholesale dealers' stamps. B. J. C. Conklin, Distiller 4th Distr. of Ills.

[Internal Revenue Coupon.]

Examination of George S. Carmichael resumed by Mr. Goudy.

118 Q. I will ask you now whether your firm has dealt in highwines in this market to any extent? A. Well, we have as the agent for a distillery, Mr. Moir, we handled considerable many of his wines.

Q. Are you members of the board of trade? A. We are.

Q. What kind of business are you doing? A. A general commission business.

Q. Have you had knowledge with regard to the transactions to any extent in the buying and selling of highwines, or in the manufacture? A. I have.

Q. Is there any general usage or custom in regard to the use

and delivery of a government coupon—was there prior to the first of May? A. There was.

Q. Now state what it was? A. It was required by all parties dealing in wines that a coupon should accompany the delivery of the wines, with either the bill of lading or the account of sale or the invoice; and dealers would not receive wine—those wines, where we have delivered, dealers would not receive them unless we had the coupon accompanying them to deliver at the time.

Q. Would they pay without receiving a coupon? A. No, sir; they wouldn't pay; of course they wouldn't pay anything on the wines without receiving a coupon.

A. And also receiving the highwines? A. Receiving the highwines, yes, sir.

Q. On the part of the seller, the usage has been to have the
119 seller deliver the highwines and coupon and the buyer to pay the bill? A. Yes, sir.

Q. How extensive or universal is that usage or custom? A. I have never known an exception in our experience where wines have been delivered without the coupons, or where parties would receive and pay for wines without coupons.

Cross-Examination by Mr. Horton.

Q. Did you ever obtain any money from a bank on a bill of lading for highwines? A. No, sir.

Q. Did you ever know of any such a transaction? A. No, sir.

Q. Within your personal knowledge? A. No.

Q. Do you know whether with the bills of lading advanced to banks they take these coupons with them? A. Yes, sir; that is the custom, I understand.

Q. How do you know if you never knew of a transaction? A. I only know from hearsay, they always attach their coupons with the bill of lading and the invoice; but we have never borrowed money in that way.

Q. Was it you, personally, that saw Mr. Conklin in regard to these wines and made the contract with him? A. Yes, sir.

120 Q. What time of day did you see him first? A. Well, I believe between eleven and twelve o'clock.

Q. What day? A. On the 18th.

Q. Now what was the contract or arrangement with Mr. Conklin? A. When I first went on 'Change I gave the order to Mr. Ford to buy a hundred barrels of wines. I suppose a short time after that—probably fifteen or twenty minutes—he came to me and said he purchased fifty of Conklin and fifty of Lynch—or rather

Mr. Lynch sent a man to me who said Lynch had fifty to sell; well, I stepped up to Mr. Conklin and told him we had been called upon in the name of Moir on this contract, "buyers option," and the wines had to be delivered that day in order to fill that contract. We then agreed upon the price, or rather the price had been agreed upon before between him and Mr. Ford, and I gave him the direction about where to deliver them.

Q. What direction did you give him? A. I gave him direction to deliver them at Ames' store on River street.

Q. When? A. That day.

Q. Fifty barrels? A. Fifty barrels.

Q. When did you next see Mr. Conklin? A. The next morning.

Q. Did you give the same instructions to Lynch in regard to the delivery? A. Yes, sir.

121 Q. Did Mr. Conklin deliver the wines that day to Mr. Ames? A. Yes, sir; I suppose they were delivered that day.

Mr. GOUDY: Do you know anything about that, yourself? A. No; my partner went down there to tend to receiving the wines.

Mr. HORTON: Which partner? A. Mr. Phillips.

Q. Did Mr. Phillips tell you they were delivered? A. Yes, Mr. Phillips said they were received there that afternoon.

Q. The first time you went to Ames' place was the next day, the 19th? A. Yes sir.

Q. Were the wines then in his store? A. Well, I didn't see the wines there, I think the wines were not there when I went there.

Q. You next saw the wines in the railroad depot freight house? A. Yes sir.

Q. When did you pay Conklin for these wines? A. On the 19th.

Q. What time of day? A. Well, I should think about between eleven and twelve o'clock, it was during Change hours—I can't tell exactly—it was during 'Change hours, from eleven to one.

Q. Was there any question arose between you and Mr. Conklin regard to paying for the wines at the time? A. Yes.

Q. What? A. We asked him to replevy the wines in his own name, and he declined doing it; he said he had delivered the wines to us on the contract, and that he didn't consider himself liable to replevy—that he would not.

122 Q. He said that he had delivered the wines according to contract? A. Yes, he claimed that he delivered the wines to us on our purchase.

Q. What time of day do you say it was that you came from the

depot up to Ames' store after taking the wines down at the depot? A. Immediately after 10 o'clock, it was about 10 o'clock.

Q. Did you commence this suit before the sheriff had levied then on an execution against Ames? A. Well, I think not; the sheriff was in possession when we got back to the store there.

Q. Then you are positive now that you did not commence it until after the sheriff levied the execution? A. Of course, we supposed that he had levied the execution, we understood that the sheriff was in possession under an execution.

Q. Was this prior to the time you commenced this suit? A. Yes, sir.

Q. What time did you get possession of these wines in this suit? A. I aint positive about it. I didn't go with the sheriff, but it was during the middle part of the day sometime. I know it was after "'Change". I think that I sold them over to Shufelt. The sheriff took possession of them and delivered them by our order right to Shufelt's store, or delivered them, turned them over to us at the depot I guess, and we, I think, hired drays and sent them over to Shufelt's store, but it was during the middle part of the day sometime.

The COURT: You didn't go down with the sheriff? A. No, I 123 didn't go with the sheriff to the depot.

Mr. HORTON: You state you wanted Mr. Conklin to replevy them? A. Yes, sir.

Q. That was on 'Change, the 19th? A. Yes, sir.

Q. Did you replevy them before or after 'Change? A. During 'Change hours.

Q. During 'Change hours? A. Well, that is, we went immediately from Ames' store—we went immediately to Mr. Goudy's office, and left directions there to take the legal proceedings for the replevy, and Mr. Goudy had charge of it from that time. I didn't follow it up into the sheriff's hands.

Q. Then how do you know what time the suit was commenced? A. I only know that we gave the order to Mr. Goudy at that hour.

Q. You gave the order to Mr. Goudy then, between 10 and 11? A. Yes, that's what I mean by it; I don't know what time the writ was obtained.

Q. You don't mean to state, then, that you had replevied them before "'Change" do you? A. No, sir, I don't mean that we got possession of them before 'Change.

Q. But that you had issued your writ before 'Change? A. I don't know whether it was or not.

Q. If you had issued your writ why did you want Conklin on

'Change to replevy them—if you had already replevied them? A. We thought that he probably could make a better title than we
124 could. We claimed that there had not been a full delivery, and he claimed that there had been, and of course we wanted the party to commence the attachment, who had the best title.

Q. And on his claim that there had been a good delivery, you paid him for them?

A. Yes, we consulted Mr. Goudy about it, and he thought we were liable on the delivery by Conklin, and we paid him.

The COURT: Change hours are from eleven to one.

A. Yes, sir.

Q. And that conversation with Conklin in regard to replevying was on Change? A. Yes, sir, on 'Change.

Mr. HORTON: On the 19th? A. Yes, on the 19th.

The COURT: And was that before your writ was issued? A. Well, I don't know; I think it was after we first went to Mr. Goudy's office; it was after we went there and left directions about proceeding, but I don't know at what hour the writ was obtained.

Mr. HORTON: At the time that you purchased these wines from Conklin and directed their delivery to Mr. Ames, you considered Ames responsible and solvent, didn't you? A. We knew nothing to the contrary. We had never had any business transactions with him, and didn't know about his responsibility up to that time.

Q. It was about nine o'clock the 19th that you went down to Ames to collect the pay? A. Yes, sir.

125 Q. You found nobody there to pay for them? A. No, sir. Well, Mr. Phillips, our partner was there the afternoon before, while the wines were being delivered. I wasn't there.

Q. You wasn't with him? A. No.

Re-direct Examination by Mr. Goudy.

Q. You say that Mr. Phillips told you that these wines had been delivered. Do you mean to say that they had been legally delivered to Mr. Ames, or simply that they had been left there?

Mr. HORTON: I object to his judging whether they had been legally delivered or not.

The COURT: The question is what Mr. Phillips said?

A. Mr. Phillips, when he came to the office, said that the wines were delivered there while he was there—they were unloading the last of the wines between five and six; that he couldn't find Ames or Ames' book-keeper, or any one there to pay for them, and he requested the laborer in charge there to keep the wines, or leave them there till morning—that he would come there and see Ames

the first thing in the morning; that so far as we were concerned, that we received the wines there—that they were delivered to us, I suppose.

Mr. EDSALL: Now, here is another examination. I do not know as we want it. If they desire it read.

Judge BARNUM: I do not desire anything, but you offered it.

126 Mr. EDSALL: This does not appear to be material in this case, but I have no objection at all to its going in if they want it.

Judge BARNUM: You offered the whole thing at first. So you might as well go on with all that is relevant, all of it.

Mr. EDSALL: It does not have any particular bearing.

The COURT: Does this go in without objection?

Judge BARNUM: No, sir; but they originally offer the whole thing.

The COURT: Do you object to what they are going to read now?

Judge BARNUM: No more than I have already heretofore objected.

The COURT: Do you object now?

Judge BARNUM: I told your Honor I objected originally to the whole of it; that is the only objection I am making.

The COURT: If you object to it, that is the end of it. They say they propose to read it for your benefit.

Judge BARNUM: I will read it under their offer, if it is any trouble. They originally offered it all.

Mr. EDSALL: I don't care whether it is read or not. I will read it if the counsel state they want it read.

Judge BARNUM: If I read it, I read it because they offer it. I do not read it as our testimony.

The COURT: Then it will go in subject to their objection?

Mr. EDSALL: Yes, sir.

The COURT: This may be objectionable.

Mr. EDSALL: I will then state that I do not regard that part of it as pertinent to the issues, and if they object to it, I will not read it.

Judge BARNUM: We are not objecting to your reading what you offered originally.

127 Mr. EDSALL: You need not read it now unless you want to.

The COURT: Read whatever you desire subject to their exception.

Judge BARNUM: I will read the whole of it except the hearsay parts. When I come to hearsay I will object. It would be like reading half a letter or half a will.

The COURT: They are entitled to the whole if you want it.

Counsel for defendant continues the reading as follows:

"GEORGE S. CARMICHAEL, being recalled was examined by Mr. Goudy and testified as follows:

Q. Did you see Shufelt in regard to the sale of these highwines? A. Yes I made the sale—at least I suppose I closed the sale. Phillips told me that the wines were delivered at Shufelt's sidewalk; I immediately went down there and closed the sale with him.

Q. Was there anything said about this coupon? A. He wouldn't have them without the coupon; he said he didn't want the wines without the coupon; I immediately went over to Conklin's store and had H. H. Shufelt's name written in there.

Q. You did it at that time? A. I did it at that time; I went over to Conklin's store, and he wrote the name in and I took the coupon and the bill, right over to Shufelt's; the wines then were on Shufelt's platform outside.

Q. Nothing done with them until you delivered? A. No, they didn't want to do anything with the wines until they got the coupon—that is what they told me.

128 *Cross-Examination by Mr. Horton.*

Q. You didn't sell the wines to Shufelt until after you paid Conklin for them, did you? A. No, I suppose the sale was not closed, although from what Phillips says he probably understood that they were taken at the market price; but there was no market price fixed until I went down there.

Q. That was after you paid Conklin for them? A. Yes, sir.

Q. When you paid Conklin for them that coupon was filled? A. Yes, sir.

Q. And that coupon was made out to Wilson Ames? A. Well, I am not sure; I had H. H. Shufelt written in there.

Q. In place of whose name? A. I suppose in place of Wilson Ames.

The COURT: There is no doubt about that.

Mr. GOUDY: I will ask Mr. Carmichael one more question:

Q. The question is, whether Mr. Conklin insisted on payment before you were to have the wines in any way—whether it was to be paid in advance? A. He required me to pay for it at that time.

The COURT: On the 18th when you bought the wines—whether anything was said then? A. Oh, yes, he said at the time, he would hold us responsible for the payment, I told him of course we would hold ourselves responsible for the payment.

Mr. GOUDY: And when you met at my office, did he not say
129 that he would take you for the payment? A. Yes, sir.

Q. And you told him you would pay it? A. Yes, he said he held us responsible for it and required us to pay it.

Q. And you told him you would pay it? A. Yes, we decided to pay it.

Mr. HORTON: The sale to you by Conklin was made in the usual transaction of business, wasn't it, on 'Change? A. Well, it was a little different because we purchased in the name of Moir; we don't generally purchase in another party's name, but this sale was made by Moir individually.

Q. I don't mean as to the parties, but as to the terms and manner of sale; a sale on 'Change is a cash sale, isn't it? A. No.

Q. Generally considered so? A. Goods are delivered generally to us, when we purchased goods, and we pay on their delivery; but here we asked him to deliver to another party, and he said he would hold us responsible.

Q. Do you usually pay on delivery? A. We do, sir.

Q. At the time goods are rolled into your warehouse? A. Well, we have no warehouse, and don't receive wines in that way; but the delivery of grain and everything of that kind we pay on delivery.

Q. What do you mean by on "delivery"? A. When we receive a warehouse receipt for grain we always check for it.

130 Q. Suppose there is an actual delivery of the goods—of the property and not by any papers? A. Well, there is very little of that sort that we do.

Q. Isn't it done so with highwines? A. Yes, sir.

Q. That's the way its done altogether with highwines, isn't it; if the wines are delivered in the afternoon, are not the bills presented the next day? A. We generally present them the same day we deliver them.

Q. Isn't it customary to present the bill the next day when they are delivered in the afternoon or evening? A. If they are delivered at the close of business hours, I suppose it would be customary.

Q. If they are delivered after the close of business hours at one o'clock, isn't it customary to present the bill the next day? Isn't that the custom now of doing business with highwines? A. I can't say outside of our own experience in the matter.

Q. Isn't that your experience then? A Our experience is, we always collect the same day if we can, that they are delivered.

Q. Isn't it your experience where you buy wines that are delivered in the afternoon or towards night, that the parties present their bills the next day for payment? A. Well, sir, I can't say that it is. I think our custom is always to collect the same day if we can do it within business hours.

131 Q. What do you call business hours? A. Well, up to 5 o'clock.

Counsel for plaintiffs then read from said transcript the testimony of T. S. Phillips, as follows:

T. S. PHILLIPS, one of the plaintiffs, having been duly sworn was examined in chief by Mr. Goudy and testified as follows:

Q. Are you one of the plaintiffs? A. Yes, sir.

Q. Did you go to Wilson Ames' business house on River street the 18th of July? A. I did.

Q. What time of day? A. Well, it was from 4 to 6 o'clock.

Q. Can you fix the time any more definite than that? A. I could not.

Q. Was you there more than once? A. I was there twice.

Q. Fix the time as nearly as you can? A. Well, I think one was somewhere between 4 and 5 o'clock, probably half past four; the next time I was there between 5 and 6.

Q. What did you go there for? A. I went there for the purpose of tendering Mr. Ames 100 barrels of highwines for account of Moir & Co.

Q. Did that include the fifty barrels purchased from Conklin now in question? A. Yes, sir.

132 Q. Did you find any of these wines purchased of Conklin there the first time you went? A. I did.

Q. Were they all there at that time? A. Well, no, sir.

Q. The second time that you went were they all there? A. Well, I think they were delivering the last of them when I was there?

Q. You say "they," who was doing it? A. The teamsters.

Q. Did you find Mr. Ames there? A. No, sir.

Q. Either time? A. No, sir.

Q. Did you find any clerk or book-keeper? A. No, sir.

Q. Who did you find? A. I found a laboring man there.

Q. Did you endeavor to ascertain where Ames or his clerks were? A. Yes, sir.

Q. Did you get any information about it? A. They didn't know—the men in charge didn't seem to know where they were.

Q. How long did you remain? A. Oh, I remained—I was probably there for an hour, the first time, and about half an hour the last time.

Q. What time did you leave the last time? A. Well, at pretty near 6 o'clock.

Q. Did you make any tender of the wines to anybody? A. No, sir.

133 Q. Nobody to make them to? A. I simply remarked to

the man that I would leave those wines there until morning—I wanted to collect for them before I delivered them—I would be there in the morning—told him to tell Mr. Ames that I would come down.

Q. Did you go there the next day? A. Yes, sir.

Q. What time? A. It was about 9 o'clock.

Q. Any one go with you? A. Not the first time, no, sir.

Q. What did you go there at that time for? A. I went there to make the tender.

Q. Who did you find there then? A. I found this same man.

Q. Did you make any tender? A. I didn't find Mr. Ames, I couldn't do it.

Q. Where did you go then, or what did you do? A. I came back to the office and told Mr. Carmichael—to use my own expression—I thought there was a "nigger in the fence."

Q. What then? A. He got in the buggy and we both went down there together.

Q. What time was that? A. Well, that was in the neighborhood of 9 o'clock. I was there but a short time, and came right up to the office, and Carmichael got into the buggy and we drove right back.

Q. What did you do then? A. We didn't find the wines
134 there; we asked the man in charge where they were, he said he didn't know—they had been shipping some wines—sending some to the depot; we asked him what depot; he said Michigan Central; we immediately went down there and found fifty barrels that had been shipped. One car-load had just been gone. It hadn't been gone fifteen minutes.

Q. Were those wines now in question replevied in this suit the wines that you found? A. Yes, sir.

Q. What did you do then, after you found these wines at the depot? A. We came back to Mr. Ames' store, and found the sheriff in charge.

Q. What then? A. Then we set to work replevying the wines—went right to your office.

Q. You made the complaint—made the affidavit in this case? A. Yes, sir.

Q. When you paid Conklin for these wines did you receive that coupon (handing witness coupon)? A. Yes, sir, this was attached to the bill.

Q. Did you receive it at the same time? A. Yes, sir.

Q. When was that payment made? A. The payment was made about 12 o'clock, I should think.

Q. What day? A. On the 19th. I know we went from 'Change.

Q. Did you have a conversation with Mr. Haddock, president of National Bank of Commerce, about the advance of money? A. Mr. Haddock came to our office to see about the matter.

Cross-Examination by Mr. Horton.

135 Q. What did you say you went down to Ames' place for? A. To make a tender of these wines.

Q. For any other purpose? A. No, sir.

Q. Just simply to tender them? A. Simply to tender them and deliver them.

Q. Did you go to collect your bill? A. I intended to go right from there to Conklin, and see that the bill was collected, but I couldn't find Ames to deliver the wines to, and, therefore, I didn't go.

Q. You had no bill with you? A. I had no bill with me.

Q. You was there simply for the purpose of formally tendering them to him? A. Yes.

Q. And then of going to Conklin—getting the bill and collect of them? A. And collect of them.

Q. When this coupon was delivered to you it was made out to Wilson Ames, wasn't it? A. I don't know whether it was made out to Wilson Ames or Shufelt; the highwines had already been delivered to Mr. Shufelt, when they were paid for.

Q. Had they been delivered to Shufelt before 12 o'clock that day? A. About 12 o'clock that day I went from Mr. Goudy's to the sheriff's office—then I took the sheriff right from the office, got in the buggy and went down and had the wines up there in
136 fifteen minutes.

Q. You went from the sheriff's office to the depot and had them up to Shufelt's in fifteen minutes? A. I took them on five or ten drays, I got the drays at the corner of S. Water street, and Wabash avenue, and just told them to follow me, they all come in a string.

Q. Isn't that fifteen minutes rather figurative? A. Well, it was done pretty quick; then we came back and met these gentlemen on 'Change and paid them.

Mr. GOUDY: Then you started at 4 or 5 o'clock for Michigan and captured the others? A. Yes, sir; took the first train for Detroit.

Mr. HORTON: At the time you delivered the wines to Shufelt, did you deliver the coupon with them? A. At the time I delivered the bill.

Q. At the time you delivered the wines, did you deliver the coupon? A. I didn't go to Shufelt's myself, I sent the wines up there.

Q. You don't know when the coupon was delivered to Shufelt of your own knowledge? A. It was delivered with the bill.

Q. Well, was the bill then delivered with the wines? A. Not right away. I don't remember when our book-keeper went with the bill—that I couldn't tell you.

Q. It was not until after the wines were delivered, was it? A. No.

The COURT: Then the wines were probably sent to Shufelt's place before you had any bargain to sell them to him? A. I sent them right up there.

137 Q. Before seeing him at all? A. I saw Egan; Egan told me to send them; said I, "I am going to send some highwines here," said he, "well, send them along."

Q. But no bargain to sell them to him had been made? A. Well, I don't recollect about that—I couldn't tell you.

Mr. GOUDY: Where did you leave them? A. In Shufelt's store.

Q. Where—on the sidewalk, or in the house? A. On the sidewalk. When I came back from the depot after I got the last load off, they were rolling them in.

Q. Isn't it a fact that you hadn't sold them to Shufelt after all? A. Shufelt said he would take them at the market price.

Q. That was all that was said, wasn't it? A. That was considered a bargain.

Counsel for plaintiffs in this case next offer and read in evidence the deposition of John C. Nicol, as follows:

JOHN C. NICOL, called as a witness, testified as follows:

(Mr. REID, counsel for the defendant objects to the taking of the deposition of this witness, on the account of the failure to comply with the requirements of the statute in that regard.)

138 *Direct-Examination by Mr. Edsall.*

Q. What is your name? A. John C. Nicol.

Q. What is your age and residence? A. My age was sixty-two last November; residence Chicago, Illinois.

Q. What is the condition of your health and has been for several weeks past? A. I have been confined to the house with rheumatism under the doctor's care.

Q. Are you able to attend court? A. I am not.

Q. Where did you reside in 1870? A. At Oquawka, Henderson county, Illinois.

Q. Were you then a member of the firm of Robert Moir & Co.? A. Yes, sir.

Q. Who, besides yourself composed that firm? A. Robert Moir and James Peterson.

Q. In what business was that firm then engaged? A. General merchandise, distilling and banking.

Q. Did you ever have any knowledge of the firm of Robert Moir & Co., having made a contract with Wilson Ames in June, 1870, to sell to him 100 barrels of highwines? A. I was informed by my partner that was the case.

Mr. REID, counsel for the defendant, objects.

Mr. EDSALL: At the time that you were informed the con-
139 tract was made, state whether your firm had on hand the highwines to fill that contract?

Mr. REID, counsel for the defendant objects to the form of the question, as it takes it for granted there was a contract, and asks for the nature and kind, and calls upon the witness to specify what the contract was, if there was one.

A. We were manufacturing highwines, and we had plenty on hand to fill it.

Mr. EDSALL: Q. What became of the highwines that you were then manufacturing? A. They were destroyed by fire in the bonded warehouse.

Q. Where and how were they destroyed by fire? A. They were destroyed by lightning at Oquawka, in the bonded warehouse; there was a thunder-storm, and the lightning struck the bonded warehouse and burned it up and the whiskies with it.

Q. What quantity did you have in the warehouse? A. About 300 barrels.

Q. When did that fire take place? A. June 30, 1870.

Q. After the burning of this warehouse, so far as you know, what arrangements were made, and with whom, to fill that contract with Ames?

Mr. REID: State of your own knowledge, personal knowledge.

A. We had an arrangement with Phillips and Carmichael in case we did not get ours there.

Q. In what business was Phillips and Carmichael engaged, and
where did they carry it on? A. In the commission business
140 in Chicago.

Q. State, so far as you know, what they did in respect to filling that contract? A. They bought 100 barrels of wine of two parties here, and drew on us for the money to pay it.

Q. From whom did they buy the 100 barrels of highwines? A. Lynch and Conklin. Lynch and Conklin are separate parties.

Q. How much did they buy from each? A. Fifty barrels.

Q. Who paid for the wines which Phillips and Carmichael bought from Lynch and from Conklin?

Mr. REID, counsel for the defendant, objects to the question because it assumes without the witness stating he has personal knowledge that they did buy the highwines of Conklin and Lynch to be delivered to Mr. Ames.

A. Phillips and Carmichael notified us that they had delivered the wines to Ames, when they drew the draft.

Q. Did your firm of Robert Moir and Company pay that draft? A. Yes, sir.

Q. What was the amount of that draft, and the date that you paid the same? A. We paid the draft July 21, 1870, amounting to $6,476.99.

Mr. REID: Counsel for the defendant asks what paper heis testifying from that he holds in his hands? A. The leaves of the cash-book of our firm, and the account of the Union National Bank.

141 Q. State whether they are the originals, or whether the paper is copied from them, and in whose handwriting they are? A. They are originals. The cash book is in my handwriting, and the bank-book is in the banks handwriting.

(Mr. REID, counsel for the defendant, moves to have all the answers in regard to the payment of the draft, time and amount, expunged from the record.)

Mr. EDSALL: Q. State whether or not you know that the amount of the draft, and the date specified by you, are correct? A. Yes, sir.

Q. Has Wilson Ames ever paid your firm for those highwines? A. No, sir.

Q. I understand you were then, in 1870, manufacturing and dealing in highwines? A. Yes, sir.

Q. Can you state the number, or average number of proof gallons there would be in a barrel of the highwines in question?

(Mr. REID, counsel for the defendant, objects to the question because it calls upon the witness for his opinion as to a matter entirely outside of the contract declared on, and otherwise improper and irrelevant.)

A. About sixty-five gallons.

Mr. EDSALL: Q. Was the number of proof gallons in a barrel greater or less than the number of gallons by mere measure?

A. The proof is what counts in more.

142 Q. What per cent. more? A. Thirty to forty per cent. more.

Q. What would be the number of gallons by mere measure? A. Forty to fifty.

Q. State if you know what the price was at which Phillips & Carmichael bought the wines to fill this contract?

(Mr. REID, counsel for defendant, objects to the question unless the witness states that he has actual personal knowledge that any such highwines were bought.)

A. Yes, sir. I have personal knowledge, the price was ninety-eight cents per gallon.

Mr. EDSALL: Q. State whether your firm ever agreed with Wilson Ames, or any one else, to accept anything less than the full amount due on the highwines in satisfaction of your claim against Wilson Ames for the same? A. No, sir, we never agreed to it.

Q. Did your firm of Robert Moir & Co. ever authorize Phillips & Carmichael or any one else, to agree with Ames to accept $300 or $600, or any sum less than the full account due on the wines, in satisfaction of your claim against Ames? A. No, sir, we never authorized anybody to compromise it.

Q. Are you contemplating leaving this city and going elsewhere, if so, state what your intention is in that regard? A. My contemplation is, unless my health improves better than it is now, I will go south, to Florida and Georgia.

Q. With what ailment are you afflicted? A. Rheumatism.

143 Q. Are you now able to go out doors and walk about? A. No, sir.

Q. Did Phillips & Carmichael ever pay your firm for the wines delivered to Ames? A. No, sir.

Cross-Examination by Mr. Reid.

Q. Is the firm of Robert Moir & Co. still in existence? A. No, sir.

Q. When did the firm dissolve? A. In 1872 I went out, the other partner that was in with me went out in a year or two afterwards. Robert Moir is still in the firm, it is called the firm of Robert Moir & Co.

Q. Do you know where Mr. Peterson, the other member of the firm, resides? A. At Burlington, Iowa.

Q. Where does Mr. Moir reside? A. Oquawka, Illinois.

Q. Do you know what has become of the books of the firm that were in existence at the time you carried on business in 1871, at the time you went out? A. Yes, sir; they are down there at Oquawka.

Q. Did you ever see Wilson Ames, the defendant in this case? A. No, sir.

Q. Have you any personal knowledge that there ever was any contract made with Wilson Ames to sell him highwines by your firm, except what you have been told by your partner, or you

have derived from information or from letters received from
144 Phillips & Carmichael? A. It is like every other business we have, if one partner makes a trade he tells the others.

Q. That, then, is the only source of your information, is what your partner has told you, and such as you have derived from letters from Phillips & Carmichael? A. Yes, sir.

Mr. REID, counsel for defendant, asks that all the testimony of the witness in regard to the making of this contract and what was done under it, be expunged from the deposition.

Mr. REID: What was the capacity of your dis illery in June, 1870, for making high wines. A. About eighty-five barrels per week, running in the day time.

Q. Did you, at that time, manufacture any other kinds of liquors than nigh wines? A. No, sir; we only manufactured high-wines.

Q. Did your firm, at that time, have any other contract with other parties to sell some highwines in the month of June, 1870? A. No, sir.

Q. How many barrels of highwines did you say you had on hand at the time of the fire? A. About 300 barrels, more or less; about that.

Q. You do not know, of your own knowledge, whether Phillips & Carmichael ever bought any highwines of any other parties to fill this contract, this so-called contract with Ames? A. No, sir.

145 Q. How often did your firm take an inventory of an account stated of that business, so far as they did the distilling? A. I done the business altogether, but the distilling part was a separate account; the general account was altogether.

Q. About how often did you take this? A. Do you mean the whole business?

Q. Yes, the firm? A. We done it at the end of the season.

Q. What do we call the season, one year? A. Yes, sir, once a year.

Q. When you retired from the business was there an inventory taken of the assets of the firm? A. Yes, sir.

Q. In that inventory was there mention made of any claims against Wilson Ames, the defendant in this case, as an asset of the firm? A. All the accounts that were open—

Q. Answer my question, yes or no, you can explain afterwards? A. We made a claim on Phillips & Carmichael for the amount that was not settled.

Q. Did there stand upon the books of your firm at the time you withdrew from it any charge against Wilson Ames, the defend-

ant in this case? A. No, sir; the claim was made on Phillips & Carmichael.

Q. Did your firm, after the date of this alleged contract with Wilson Ames, have a suit with Phillips & Carmichael in regard to these same 100 barrels of highwines or their proceeds? A. Yes, sir.

146 Q. Was that suit ended or was it pending at the time you withdrew from the firm? A. It was pending.

Q. Will you please state again the date that you withdrew from the firm? A. January 1, 1872.

Q. Have you seen the books of the firm since you withdrew from the same? A. Yes, sir.

Q. In your settlement with your partners at the time you withdrew, was this claim of your firm against Phillips & Carmichael treated as an asset of the firm, or not? A. It was an open account.

Q. The question was, was it treated as an asset? A. Yes, sir.

Q. At what time did Mr. Peterson withdraw from the firm, if you know? A. I think about two years after I did; I am not positive about that.

Q. When you withdrew from the firm did you assign over all your right, title and interest to all the proceeds of the firm? A. No, sir; they were left open.

Q. Who received the mail of your firm and opened it, when you were connected with it? A. Probably one of the boys went after it. I generally opened it.

Q. Did you, while you were there with your firm, receive any notice of the bankruptcy of Wilson Ames, the defendant in this case? A. No, sir; I read all the letters that came in; I kept the books.

147 Q. I understood you to say you did not know of your own knowledge that Wilson Ames ever made a contract with your firm, or that any of the highwines were delivered to him or not? A. I know to my knowledge that Phillips & Carmichael notified us—

Q. You do not know anything of your own knowledge then, that Wilson Ames ever made a contract with your firm?

Mr. EDSALL: Let him answer the question, I would like to have him finish that question before you ask him the next question, that is, if he has anything further to say on that question. A. I haven't anything more to say.

Mr. REID: Answer the question, do you know of your own knowledge? A That is the only answer that I have got to it.

Q. Is that the only answer that you have got to make? A. Yes, sir.

Q. Have you any interest in this claim now being prosecuted in this suit? A. Yes, sir.

Q. Please state what it is? A. I have my share of what is recovered so with the other parties.

Q. In your examination in chief you answered to the making of this contract, in regard to the fulfillment on your part, by Phillips & Carmichael; is that solely derived from information from your partners, and from letters and from correspondence with Phillips & Carmichael, or other persons than the defendant? A. I was not present, but the business was all familiar to me at the time.

148 Q. State how it was familiar to you? A. From correspondence and information.

Q. And correspondence with whom? A. Phillips & Carmichael, the general knowledge of the firm of everything that was transacted, it was understood when one bought grain, of course they informed the others; if one loaned money he consulted the others.

Q. As a matter of fact you had no personal knowledge of this transaction? A. No, I was not here then, not any nearer than Oquawka.

Q. Did you recover anything from the insurance companies at the time of the fire? A. No, sir, we were not insured; we never insured at all, not down there.

Q. If you had this claim against Wilson Ames and you were interested in it as you say, why have you allowed this matter to lay idle without any attempt to collect for nearly fifteen years, or thereabouts? A. One reason why, I left with Mr. Moir the unfinished business; I was away part of the time, in fact my health was bad, I did not bother anything about the business. If you want another reason, we heard that Ames was busted, and then we heard that he had got to be a millionaire.

Q. Did you hear before you withdrew from the firm that he had busted? A. When they got the wines.

Q. How long is it since you heard he was a millionare? A. Within a few years I saw his name in the papers.

149 Q. How long since you have seen your partner, Mr. Peterson, and talked to him about the business? A. It is some time. I saw him in December, but I didn't have any talk about the business or a very little.

Q. Do you consider your old firm still in existence? A. No, sir, only in liquidation.

Q. Has the old firm any other matters in liquidation? A. Yes, sir; we have a distillery that we would like to dispose of.

Q. You say that on an average there are 65 gallons of proof whisky in a barrel. Do you mean by that in the barrels of high-

wines that you manufactured a barrel would hold about 65 gallons? A. No, sir; our's wasn't as high proof as they have here; sometimes the proof is more, and sometimes it is less.

Q. You testified in your examination in chief that the firm never agreed to accept anything less than the full amount of this claim in satisfaction of it, are you willing to swear positively that neither of your other partners ever agreed to do so? A. Yes, sir.

Q. Will you please state how you can swear as what your other partners agreed to? A. Because they told me they never did; I think I know all about them; I would as lief take their word as their oath.

Q. Do the books of your firm show any credit of any amount to Phillips and Carmichael on account of this alleged contract with Wilson Ames or what was done under it? A. No, sir; there was no credit.

150 Q. Were you in the year 1870 personally acquainted with the firm of Phillips and Carmichael? A. My acquaintance was very little with the firm. I was acquainted with Mr. Phillips, I did not know Mr. Carmichael.

Q. Did they in June, 1870, act in any other matters, have your agency excepting in regard to this occasion with Mr. Ames? A. Oh, yes; they sold our wines.

Q. How long had they been selling your wines? A. They had been selling our wines for several years.

Q. How long did they continue in that capacity after that? A. A very short time.

Q. Did your firm to your knowledge ever have a settlement with the firm of Phillips and Carmichael? A. No, sir.

Q. When was the first that you had knowledge that this suit was connected (commenced) or pending? A. About a year ago, I guess it was.

Q. Had it then already been commenced, or not? A. I do not know whether it had been commenced or not; they talked about it; I saw it in the paper. I don't remember the date.

Q. Has Mr. Peterson any interest in this claim? A. Yes, sir.

Q. Has Mr. Moir any interest in this claim? A. Yes, sir.

Q. Have you been called upon to pay any of the costs of this proceeding thus far? A. No, sir, I have not been called on; I understood my partner would pay the costs.

Q. Which partner? A. Mr. Moir charged it to us, the 151 way all the business was done.

Q. How long since you have seen Mr. Moir? A. About a month.

Re-direct Examination by Mr. Edsall.

Q. Mr. Nicol, I understood you to state on your cross-examination that your firm, Robert Moir & Co. made a claim on Phillips & Carmichael for this 100 barrels of wines in question, of the value of them, will you explain why it was that your firm made such a claim against Phillips & Carmichael; give a full history of that? A. Phillips & Carmichael was paid for attending to the business. They delivered the wines to Ames, and we considered them responsible without getting the money for them. Ames got them out at night and we lost them.

Q. You said you paid Phillips and Carmichael for the wines? A. Yes, sir.

Q. Do you know personally that your firm paid it. A. Yes, sir.

Q. State the amount of that check or draft? A. $6,476.99.

Q. Something was said on the cross-examination about a suit of Robert Moir & Co. against Phillips & Carmichael to recover the value of these wines; do you remember that suit? A. Yes, sir.

Q. Were you successful in that suit? A. No, sir.

152 Q. State why, if you know, you failed to recover for the wines from Phillips & Carmichael in that suit?

Mr. REID, counsel for defendant, objects to the question, because that is a matter of record, if there was a suit of that kind: the witness has testified that suit was pending when he withdrew from the firm.

Mr. EDSALL: Q. State why, if you know, you did not succeed in maintaining that suit against Phillips & Carmichael?

(Objected to.)

A. I don't know the reason why. We gained a judgment in the lower court; they appealed to the Supreme court, and they reversed it.

Re cross Examination by Mr. Reid.

Q. You stated on your re-direct examination that these highwines were delivered to Wilson Ames by Phillips & Carmichael; that Ames got them out during the night. Do you know of your own knowledge whether or not any such highwines were delivered, that they were disposed of by Mr. Ames, or is your statement made wholly upon information derived from others? A. Of course, on information derived from others; I was not there.

153 Adjournment until 1 P. M., February 22, 1887, to meet at the same place, by agreement of the parties.

JOHN C. NICOL.

Subscribed and sworn to before me this 22d day of February, A. D. 1887.

Isaac Jackson,
Notarial Seal,
Cook County, Ills.

ISAAC JACKSON,
Notary Public.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK, }

I, Isaac Jackson, do hereby certify that the foregoing deposition of John C. Nicol was taken by and before me at the time and place mentioned in the caption thereof, and in the presence of the attorneys of the respective parties as stated in said caption, who respectively examined and cross-examined said witness. That after said examination was concluded and written out as hereinbefore stated, the questions and answers of said witness were read over to him, and said witness, John C. Nicol, thereupon subscribed to said deposition and again swore to the truth thereof, the oath having been administered by me as said notary public.

In witness whereof, I do hereby set my hand and notarial seal this 22d of November, 1887.

Isaac Jackson,
Notarial Seal,
Cook County, Ills.

ISAAC JACKSON,
Notary Public.

(During the reading of said deposition plaintiffs' counsel ob-
154 jected to that part marked "out" and the court sustained the objection, to which ruling the defendant excepted.)

Plaintiffs next offer in evidence the deposition of James Peterson and read the same, the defendant reading the cross-examination, as follows:

The deposition of James Peterson, of the city of Burlington, of the county of Des Moines and State of Iowa, a witness of lawful age, produced, sworn and examined upon his corporeal oath on the 17th day of March, in the year of our Lord one thousand eight hundred and eighty-seven, at the office of Kelley & Cooper, No. 307 Jefferson street, in the city of Burlington, in the county of Des Moines and State of Iowa, by me, W. L. Cooper, a notary public within and for said county and state, and also a commissioner duly appointed by *dedimus potestatem* or commission issued out of the clerk's office of the Superior court of Cook county, in the State of Illinois, bearing *teste* the name of Patrick McGrath, Esq., clerk of

the said Superior court of Cook county, with the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said James Peterson, a witness in a certain suit and matter in controversy now pending and undetermined in the said Superior court of Cook county wherein Robert Moir *et al.* are plaintiffs and Wilson Ames is defendant, in behalf of the said plaintiffs as well upon the cross-interrogatories of the defendant as on the interrogatories of the plaintiffs (which said interrogatories of plaintiffs were attached to or enclosed with the commission); the defendant appeared by John G. Reid, Esq., his attorney, and propounded the cross-interrogatories to the said witness; and no other interrogatories than as above were propounded on said examina-
155 tion.

(And said deposition was also taken pursuant to notice dated February 28, 1887, attached to and sent with the commission.)

The said JAMES PETERSON, being first duly sworn by me as a witness in said cause, previous to the commencement of his examination, to testify the truth as well on the part of the plaintiffs as the defendant, in relation to the matters in controversy between the said plaintiffs and defendant so far as he should be interrogated, testified and deposeth as follows:

Q. 1. What is your name, age, residence and occupation? A. My name is James Peterson; age forty-six years; residence Burlington, Iowa; occupation, I am not in any business at present.

Q. 2. Were you a member of the firm of Robert Moir & Co., (the plaintiffs in this suit) in the year 1870, and if so, state who besides yourself, composed that firm and where said firm carried on business, and what business? A. I was a member of the firm of Robert Moir & Co. in 1870, the other members were Robert Moir and John C. Nicol; the said firm carried on a business at Oquawka, Henderson county, Illinois, at said date, and its business was banking, general merchandising and distilling.

Q. 3. Did you in June or July, 1870, have any knowledge or information as to the existence of a contract between said firm of Robert Moir & Co. and Wilson Ames, the defendant, relative to the sale of a hundred barrels of highwines? If so, state from whom you derived such knowledge or information. A. Yes, I had;
156 the contract was 200 barrels; I derived this information from my partners.

Q. 4. Were you acquainted with the firm of Phillips & Carmichael of Chicago, in 1870? If so, state what business that firm was then engaged in, and whether they transacted any business for the plaintiffs, and if so what business? A. I was acquainted with said firm in 1870. They sold highwines for us.

Q. 5. If you state that you had knowledge of or were informed of the existence of a contract for the sale of one hundred barrels of highwines by Robert Moir & Co. to Wilson Ames, deliverable in July, 1870, state, if you know, whether your firm at the time that contract was made had on hand highwines of their own manufacture sufficient to fill that contract, and if so, state what became of such highwines? A. Our firm had on hand over 300 barrels of highwines on the 30th day of June, 1870, of our own manufacture. Said highwines were destroyed by fire on that day.

Q. 6. If in answer to the last interrogatory you state that the highwines of Robert Moir & Co. were burned up in their warehouse, state when the same were so burned, and what provision, if any, plaintiffs then made to fill their contract for sale of highwines to Wilson Ames? A. As I said in answer to last interrogatory, the highwines were burned in our warehouse June 30, 1870.
157 Mr. Moir made any provisions that were made to fill said contract. I did not make any.

Q. 7. If in answer to the last interrogatory you state that plaintiffs authorized Phillips & Carmichael to buy highwines on the market in Chicago to fill plaintiffs' contract with Ames, state if you know whether your firm paid or advanced to Phillips & Carmichael the money used to purchase such highwines to fill said contract with Ames, and if so, state how much money was so paid or advanced, and the date of such payment? A. Robert Moir & Co. advanced to Phillips & Carmichael on their draft to us for highwines $\$6,476\frac{99}{100}$ on the 21st day of July, 1870. I understood said highwines to be part of Ames' contract.

Q. 8. Has Wilson Ames ever paid plaintiffs for said highwines? A. Wilson Ames has never paid me, and I have no knowledge of his paying the other members of my firm.

Q. 9. Have the firm of Phillips & Carmichael ever paid your firm for said highwines or refunded the money so advanced to pay for the same, or any part thereof? A. Not to me, and I have no knowledge of any payment to the other members of my firm.

Q. 10. Did your firm of Robert Moir & Co. ever propose or agree to accept, or did they ever in fact receive or accept, either the sum of three hundred or six hundred dollars, put up as margins on any contract or contracts with Wilson Ames, as a com-
158 promise, and in full satisfaction of the amount due from Ames for the one hundred barrels of highwines involved in this suit? A. Never, to my knowledge.

Q. 11. Did your firm of Robert Moir & Company ever receive or agree to receive from said Ames or otherwise any sum or thing less than the contract price as a compromise or in full satis-

faction of the amount due plaintiffs from said Ames for said one hundred barrels of highwines or any part thereof? A. Never to my knowledge.

Q. 12. Did the plaintiffs ever authorize Phillips & Carmichael or any one else to make any such compromise with Wilson Ames? If so, state fully what they did in that regard. A. Never to my knowledge.

Q. 13. Did you on or about July 19, 1870, or soon thereafter, go to Chicago on business connected with said highwines? If so, state how you came to go to Chicago, and what, if anything you then ascertained in respect to said highwines and their shipment by said Ames? A. I was called to Chicago some time during July, 1870, by a communication from Phillips & Carmichael because there was some trouble about the highwines delivered to Wilson Ames. I learned from them that the highwines had been delivered to Wilson Ames and by him shipped without being paid for.

Q. 14. Did your firm or any one with its authority author-
159 ize said Ames to receive, ship or dispose of said highwines without having first paid therefor? If so, state fully what you or your firm did in that regard? A. Never to my knowledge.

Q. 14 *a*. When you went to Chicago in July, 1870, did you in any way ascertain that Phillips & Carmichael had brought a suit in replevin in the Superior court of Cook county against the Michigan Central Railroad Company to recover fifty barrels of the highwines in question, and also another suit against said railroad company at Detroit, Michigan, to recover the other fifty barrels of said highwines; and if so, state from whom and how you obtained such information about said replevin suits? A. I learned from Phillips & Carmichael that such replevin suits had been brought when I was in Chicago in 1870.

Q. 14 *b*. Did Phillips & Carmichael request you or the firm of Robert Moir & Co. to prosecute such replevin suits to recover said highwines, and if so, what reply did you make thereto? A. They did make such request, and I refused to have anything to do with the matter, as Mr. Moir knew all about the contract and I did not.

Q. 14 *c*. Are George S. Carmichael and Thomas S. Phillips, of the late firm of Phillips & Carmichael, now living, or have they or either of them since died? A. I understand they are both dead.

Q. 15. Do you know any other matter or thing touching
160 the subject of your examination, material to the interests of the parties in this case; if so, state the same as fully as as if particularly interrogated thereto? A. I only know this, that I as a

member of the firm of Robert Moir & Co. have not received any consideration from any one for the highwines in controversy.

Cross-Examination by Mr. Reid.

Q. 1. Did you ever meet Wilson Ames, the defendant? A. I never did.

Q. 2. Have you any personal knowledge of any contract of your firm with Ames? A. I have not.

Q. 3. Was you informed that there was more than one contract with Ames? A. I was not.

Q. 4. Was you informed that the contract of which you have spoken was in writing, or was it oral? A. I have no recollection on the subject at all.

Q. 5. Is it not the fact, Mr. Peterson, that all that you know about any contract of your firm with Ames, in reference to highwines and what was done to comply with the same, is simply what you have learned from the firm of Phillips & Carmichael by letter or
161 otherwise, and from what has been told you by the other members of your firm? A. Yes, sir.

Q. 6. Do you know whether the firm of Phillips & Carmichael, after the time of the claimed delivery of the 100 barrels of highwines to defendant Ames, recovered possession of the same 100 barrels, and if yea, what did Phillips & Carmichael do with them, if you know? A. My impression is they recovered the highwines and sold them.

Q. 7. Did your firm commence a suit in one of the courts in Chicago against the firm of Phillips & Carmichael to recover from them the money they had received from the sale of these 100 barrels of highwines, less their commissions? A. There was a suit instituted against Phillips & Carmichael by Robert Moir & Co. to recover the money they received from the sale of these highwines, and was in Chicago. The papers in that suit will show for themselves.

Q. 8. Were you a witness in that suit? A. I was.

Q. 9. Did you, at the time Phillips & Carmichael informed you that they had commenced these replevin suits to recover these highwines, find any fault with them in that regard? A. I refused to have anything to do with it.

Q. 10. Did you, at that time, say to Phillips & Carmichael,
162 or one of them, that it would be hard on your firm if these highwines were not obtained and held in these replevin suits, or make any remark substantially like that? A. I have no recollection of making any such remark.

Q. 11. When did Mr. Nichols cease to be a member of your

firm? A. I can't tell the exact date; think about 1873 or 1874.

Q. 12. When did you cease to be a member of the firm? A. June or July, 1876.

Q. 13. When Mr. Nichol retired from the firm did he sell and assign to the remaining partners all of his interest in the assets of the firm? A. He sold his interest to Robert Moir, except some matters held in abeyance.

Q. 14. When you retired from the firm what disposition did you make of your interest in the assets of the firm? A. I sold to Robert Moir, except in some matters held in abeyance.

Q. 15. Prior to your leaving the firm was there a schedule of assets or balance sheet prepared from which you made the sale of your interest in the firm? A. When I went out there was a partial balance sheet and partial list of assets made out.

163 Q. 16. Did this statement of which you speak contain a list of the debts due the firm? A. I think it did; with the above exceptions.

Q. 17. Did this schedule or statement or balance sheet contain any item of a debt due your firm from the defendant Ames? A. I don't recollect.

Q. 18. What is your impression in that regard? A. My impression is we looked to Phillips & Carmichael for the account.

Q. 19. After Mr. Nichol retired from the firm, who had charge of the books of the firm, whilst you remained a member? A. Part of the time, Mr. Moir, most of the time myself.

Q. 20. From your acquaintance with the books of the firm, can you state whether or not at any time prior to your retirement from the firm, the name of Wilson Ames anywhere appears as a debtor of your firm? A. I will not swear that it did or did not.

Q. 21. Where are the books of the old firm, if you know? A. I don't know.

Q. 22. Have you any interest in the result of this suit, and if so, what? A. I have a one-third (⅓) interest.

164 Q. 23. When and how and from whom did you first learn that a suit was to be or had been commenced against the defendant Ames to recover the price of these highwines? A. It was a matter of consultation between Mr. Moir and myself prior to the commencement of this suit.

Q. 24. Has any other person or persons other than you three members of your old firm, any interest in the collection of this claim against the defendant Ames? A. None that I know of.

Q. 25. Have you been informed that any other one has such interest? A. I have not.

Q. 26. Have you paid anything on account of or given any di-

rections about the prosecution of this suit? A. During this consultation above referred to, I agreed to pay one-third of the costs and expenses of prosecuting this suit.

Q. 27. Have you not been informed that an agreement has been made whereby you are not to be called upon to pay or be liable for the costs and expenses of this suit in case there is a failure to recover? A. No, sir; I have not been so informed, and know of no such an arrangement.

Q. 28. When your firm commenced this suit, of which you
165 have spoken, against Phillips & Carmichael to recover the money they had received on sale of these highwines, did you or your firm claim or consider that you also had a claim against defendant Ames for the price of these same highwines? A. I do not recollect.

Q. 29. At what, if any, bank in Chicago did your firm keep or have an account in 1870? A. At the Union National Bank of Chicago.

Q. 30. Did the firm of Phillips & Carmichael, at any time after the time of the claimed contract with Ames, place to the credit of your firm at said bank any sum or sums that had been put up in their hands as margins by the defendant Ames? A. I don't know.

Q. 31. How long had Phillips and Carmichael, previous to this Ames transaction, acted as your agents in Chicago for the disposal of your highwines? A. Possibly ten or twelve years.

Q. 32. At the time you went to Chicago, in July, 1870, did Phillips and Carmichael, or either of them, inform you that the 100 barrels of highwines had never been delivered to Ames, upon the contract with your firm, but that the same had been left at Ames' place of business in charge of a porter or man there, who was
166 to act as their custodian, and that they intended to make the delivery on the next morning, and that, when they went there the next morning to make the delivery, they found that Ames had wrongfully taken possession of the highwines and shipped them? A. They told me that they made the delivery to Ames, and that when they went the next morning to get the money they could not find either Ames or the highwines.

Q. 33. Did your firm, whilst you were a member of it, receive official notification of the bankruptcy of the defendant Ames? A. I have no recollection of any such notification.

JAMES PETERSON.

Subscribed and sworn to before me by James Peterson this 17th day of March, A. D. 1887.

W. L. COOPER,
Notary Public.

W. L. Cooper,
Iowa,
Notary Seal.

I, W. L. Cooper, a notary public of the county of Des Moines and State of Iowa, a commissioner duly appointed to take the deposition of the said James Peterson, a witness whose name is subscribed to the foregoing deposition, do hereby certify that, previous to the commencement of the examination of the said James Peterson as a witness in the suit between the said Robert Moir *et al.*, plaintiffs, and the said Wilson Ames, defendant, he was duly sworn by me as such commissioner, to testify the truth in relation to
167 the matters in controversy between the said Robert Moir *et al.*, plaintiffs, and the said Wilson Ames, defendant, so far as he should be interrogated concerning the same; that the said deposition was taken at my office, to wit: in the office of Kelley and Cooper, number 307 Jefferson street, in the city of Burlington, in the county of Des Moines and State of Iowa, on the 17th day of March, A. D. 1887; and that, after said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness; and that thereupon the same was signed and sworn to by the said deponent, James Peterson, before me, the oath being administered by me, W. L. Cooper, as such commissioner, at the place and on the day and year last aforesaid.

W. L. COOPER,
Notary Public in and for Des Moines County, Iowa, and Commissioner.

STATE OF IOWA, } ss.
DESMOINES COUNTY. }

I, W. D. Inghram, clerk of the District court, a court of record in and for the county and state aforesaid, do hereby certify that W. L. Cooper, whose name is subscribed to the certificate or proof of acknowledgment of the instrument annexed, was, at the time of signing said certificate, or taking such proof of acknowledgment, and is now an acting notary public within and for said county, duly commissioned and qualified as such, and duly authorized by law to take the same; that all his official acts are entitled to full faith and credit; that the annexed instrument is executed and acknowledged according to the laws of said state; that I am well acquainted with
168 the signature of said W. L. Cooper and believe the one subscribed to said annexed instrument, and purporting to be his, to be genuine.

In testimony whereof, I have hereunto subscribed my name and affixed the official seal of said court, at my office in Burlington, this 17th day of March, A. D. 1887.

Seal of the District Court of DesMoines Co., Iowa.

W. D. INGHRAM,
Clerk.

50c. Pd.

* * * * * *

PLAINTIFF'S COUNSEL: On yesterday, in order to save time, it
169 was stated that the Exhibits A and B to the deposition of W. W. Bell, appearing in this transcript from the Supreme court, would be understood to be in evidence without reading. They are long, and a great deal of the matter is advertisement, such as they have on printed bills of lading, and I do not wish to read it all, but I wish, before we close, to read the material parts of them—the drafts and bills of lading—the papers identified by the witness, Judge Otis, the originals of which were burned up.

DEFENDANT'S COUNSEL: We have no objection to his considering them read, and when he gets to his argument he can read them. Of course they are subject to all previous objections.

The material parts of such exhibits are as follows:

170 EXHIBIT A.

"CHICAGO, July 18, 1870.

$2,800.00

Pay to the order of E. Maynard Esq., cashier, twenty-eight hundred dollars, value received, and charge same to account of

WILSON AMES.

To Mess. W. S. Miller & Co., 72 Broad St., N. Y.

(Int. Rev. Stamp, cancelled.)

Endorsed on back of same:

"Pay E. Wilson Esq., or order,

THE NAT'L BANK OF COMMERCE OF CHICAGO.

E. MAYNARD, *Cash.*

(Received payment, American Exch. Nat'l Bank.)"

To which was appended a certificate of protest for non-payment by drawee on July 22, 1870, by notary public in city of New York, and all in due and proper form, and his fees and disbursements were endorsed at $1,56.

Attached to which and as a part of Exhibit A, was a bill of lading issued by the Michigan Central Railroad Company, "Blue Line," and signed by the agent of said company, the material parts of which are as follows:

171 No. 4,674, Michigan Central Rd. Co.

CHICAGO, July 18, 1870.

Received from Wilson Ames, consigned to W. S. Miller & Co., New York, the following packages in apparent good order; contents and value unknown.

Articles.	Marks.	Said to weigh.
50 Bbls. highwines	m	1,800

Val., $20.00 pr. Bbl.

To be transported over the line and delivered in like good order to the consignee or owner at New York," etc., etc.

EXHIBIT B.

"$2,900.00 CHICAGO, July 18, 1870.

Pay to the order of E. Maynard Esq., Cashr., twenty-nine hundred dollars, value received, and charge same to account of

WILSON AMES.

To Mess. W. S. Miller & Co., 72 Broad St., N. Y.

7c. Int. Rev. Stamp, canceled."

Endorsed on back as follows:

"Pay to E. Wilson, Esq., or order for collection.

THE NAT'L BANK OF COMMERCE OF CHICAGO.

E. MAYNARD, *Cashier.*

Received payment.

AMERICAN EXCH. NAT'L BANK."

172 To which was appended a certificate of protest for non-payment by drawee on July 22, 1870, by notary public in city of New York, and all in due and proper form, and his fees and disbursements were endorsed at $1.56. Attached to which and as a part of Exhibit B, was another bill of lading, issued by the Michigan Central Railroad Company "Blue Line" signed by the agent of said company, the material parts of which are as follows:

"No. 4676 Michigan Central R'd. Co.

"CHICAGO, July 19, 1870.

"Received from Wilson Ames, consigned to W. S. Miller & Co. New York, the following packages in apparent good order; contents and value unknown.

Articles.	Marks.	Said to weigh.
Fifty (50) bbls. highwines	m,	18120.

"To be transported over the line and delivered in like good order to the consignee or owner at New York," &c., &c.

ROBERT MOIR, having been duly sworn on behalf of the plaintiffs herein, was examined in chief by Mr. Edsall, and testified as follows:

Q. You are one of the plaintiffs in this suit, Mr. Moir, I believe? A. I am, sir.

Q. You have been present here during the trial? A. I have.

Q. You heard the paper read purporting to be a copy of a contract for the purchase and sale of highwines between the firm of Robert Moir & Co. and Wilson Ames, have you? A. Yes,
173 sir.

Q. After the making of that contract specified in that paper whom, if any one, did you leave in charge of it here in Chicago to look after the fulfilling of the contract on your part and the collecting of the money due on it? A. Our commission merchants, Messrs. Phillips & Carmichael.

Q. That paper bears date June 9, 1870. At that time what business was your firm of Robert Moir & Co. engaged in and where? A. Merchants and distillers, Oquawka, Illinois.

Q. What highwines if any did you then have on hand? A. You refer to the 9th of June?

Q. Yes. sir; and up to the 30th of June? A. At the 30th of June we had between three and four hundred barrels of our own manufacture in our bonded warehouse.

Q. At Oquawka? A. Yes, sir.

Q. What occurred on that day as respects those wines? A. The bonded warehouse was struck by lightning and all consumed. It so happened that I can testify to this. I was standing in my office door and saw the bolt and almost in an instant it was all in flames.

Q. After this occurred what if anything did you do in order to put your firm in condition to comply with that contract if the wines were called for by Ames? A. I arranged with Messrs Phillips & Carmichael if we would not have wines of our own manufacture on the market before they were called, to buy on the market, and fulfill our contract.

Q. Did you direct them to do so in case Ames did not call for them. A. Yes, sir; the understanding was that they held the
174 contract in their hands, and were to attend to all the requisite details to protect our interests in the deal.

Q. After these wines were burned were you in Chicago? A. Yes, sir.

Q. Did you see Phillips & Carmichael? A. I did.

Q. About what date were you in Chicago? A. About the 3d and 6th of July.

Q. Were you on the way to any other place at that time? A. Yes, sir.

Q. Where were you going? A. Washington.

Q. Did you then have any interview with Phillips & Carmichael

and give them any instructions about what they were to do? A. I did, sir.

Q. State what you then directed them to do with respect to this contract? A. I instructed them that if my firm shipped wines in time to make our contract with Ames good, to put in our own wines, but if Ames called for the wines before my firm shipped, to buy what he had a right to get on the market and deliver for us.

Q. That was from the 3d to the 4th? A. From the 3d to the 6th of July. I can state up to that time there was no law authorizing the officer of the government to cancel bonds that had been given growing out of a loss of this character.

175 Q. By burning? A. Yes, sir. And it involved, I think, two or three days delay getting up the proof, and I was going on to Washington to present the facts, to have our bonds that we had given for the payment of the government dues on a portion of these wines canceled.

Q. Those that were burned in the warehouse? A. Yes, sir. We had paid the government on two hundred barrels of these wines in anticipation of meeting Mr. Ames' contract, and we only had bonded about one hundred barrels, or one hundred and three or one hundred and five to the government.

Q. You spoke of 200 barrels. This contract only mentions 100, are there two contracts? A. Yes, sir; two independent contracts for 100 barrels each.

Q. But this one was only 100. That was one of them? A. Yes, sir.

Q. Were you then on your way to Washington? A. I was.

Q. Did you go to Washington? A. I did.

Q. When did you return to Chicago? A. About the 22d or 23d, possibly the 24th. My folks wired me that there was some difficulty about this delivery.

Q. The 22d to the 24th of July? A. Some place thereabouts.

Q. Did you then come to Chicago? A. I did.

Q. What did you then find in respect to the wines? A. I found the case tangled. One hundred barrels that I supposed had

176 been delivered had been shipped off, and I was confronted with two pretty lawsuits, one in Michigan and one in this city.

Q. Had you commenced any such lawsuits? A. No, sir.

Q. Or authorized anybody to commence them? A. No, sir; I never paid anybody to get me into lawsuits, sir.

Q. Did you or your firm, to your knowledge, ever receive any pay from any one for that 100 barrels of highwines? A. Not a dollar.

Q. You heard the depositions of Nichols and Peterson about

the payment of the six thousand four hundred and something? A. I have, sir.

Q, You were absent when that sum was paid? A. I was.

Q. Has either Wilson Ames or Phillips & Carmichael ever paid you or your firm anything on account of that 100 barrels of highwines? A. Nothing.

Q. There is a question that I might as well, perhaps, ask now as ever: Did you or your firm or any member of it, to your knowledge, ever authorize Phillips & Carmichael or anybody else to compromise this claim of your firm against Wilson Ames for the 100 barrels of highwines, before mentioned, for either three hundred or six hundred dollars, or any sum less than the full amount of the contract price? A. Oh, certainly not.

Q. What authority, if any, in that regard did the firm
177 of Phillips & Carmichael have for your firm in that behalf?

A. They simply had authority to execute the contract for the delivery of the wine, put up and keep up the margin, deliver the wines when we shipped them to them, and collect the money and place it to our credit at the Union National Bank.

Q. Collect for the wines according to the terms of the contract? A. Certainly.

Q. And they never had any other authority from your firm? A. Never any. I might state here that I was the member of the firm that done the actual business with Phillips & Carmichael. It is possible that my associates may have seen them, but I doubt much if they ever done any business with them; that is, other than as members of our firm.

Q. You were not in Chicago on the 18th and 19th of July, when the wines were claimed to have been delivered? A. No, sir, I was not. I received the dispatch in New York City, I think, about the 21st or 22d, and my present recollection is I returned immediately.

Cross-Examination by Judge Barnum.

Q. Mr. Moir, had Phillips & Carmichael been transacting business in this city for your firm for a good many years before that? A. Several years; yes, sir.

Q. Had they transacted a great many pieces of business of this description, selling highwines and buying highwines for your firm?

A. We shipped our wines to them that we sold in this market;
178 but we shipped more probably to St. Louis than we shipped to Chicago.

Q. Then they did in a good many instances dispose of your wines? A. They did.

Q. You transacted business in their office when you were in Chicago here yourself, didn't you? A. I dropped often in there as I would with any other friend.

Q. You made that your headquarters in Chicago, didn't you? A. Well, William F. Coolbaugh was a particular friend of mine. I considered the Union National Bank my headquarters.

Q. Was or was not your name or your firm name in the office on the sign, or any of the stationery of Phillips & Carmichael? A. I never saw it. I might state to you sir, that my purpose in—

Q. I don't care about that. I am not asking anything only what I put in my question. Were you a member of the Board of Trade of the city of Chicago? A. I was and am.

Q. At that time you were? A. Yes, sir.

Q. Did you have any Chicago office? A. Not any.

Q. Did you have any other than this office of Phillips & Carmichael? A. Or the Union National Bank.

Q. Did you transact business as a member of the Board of Trade through the office of Phillips & Carmichael? A. No, sir.

179 Q. Or at the office of Phillips & Carmichael? A. I transacted business with them simply as my commission merchant.

Q. Board of Trade business? A. Yes, sir.

Q. Which you carried on on the board? A. Well, when you say carried on, my business was a seller of highwines.

Q. Well, which you transacted, the business relating to things done by you on the Board of Trade? A. Well, if you please to put it that way, do so.

Q. That is the only way I want to put it. You did transact that sort of business at the office of Phillips & Carmichael? A. What do you understand by the term transact?

Q. What do you understand? Do? Perform? A. Well, I would infer that it was the handling of the actual products, that was the transactions. I was shipping and it was generally done by letter. When wines came to Chicago, I did not, whether I was in the city or at home, make it my business to go and receive them. Phillips & Carmichael done that.

Q. I don't refer to the actual handling of them, but to any conversations, memoranda or writings, or anything of that description; did you do it at the office of Phillips & Carmichael? A. What I did, was through them as commission merchants. I never sold a barrel personally.

Q. Did you testify as a witness, Mr. Moir, in a suit brought

180 by your firm against Phillips & Carmichael, for the proceeds of the sale of the highwines in controversey to H. H. Shufelt, in a suit in the Superior court of Cook county, in this city, brought in the year 1870? A. I testified in a suit, but my understanding is that it was not a suit as you name it.

Q. You testified in a suit brought by your firm against Phillips and Carmichael? A. On a draft that they had drawn against us, for the recovery of our money, not for highwines.

Q. You did testify in such a suit, did you? A. I did.

Q. As a witness for yourself and the plaintiffs? A. Yes, sir.

Q. Didn't you testify in that suit that it was on the 18th day of June, 1870, that you met Mr. Carmichael, one of the defendants in that suit, on the Board of Trade and told Mr. Carmichael that you heard that wines could be contracted for at $1.07? A. I think I did sir.

Q. And that Carmichael doubted it? Didn't you so testify? A. I did.

Q. Didn't you further testify that you went to the whisky corner and learned that such contracts were being talked of? A. I learned that contracts were being made.

Q. Did you so testify? A. I did.

Q. Didn't you further testify in that suit that you met Mr. Wallace on the Board of Trade and instructed him to sell 200 barrels at that price? Did you so testify? I am not asking anything
181 but this, did you so testify? A. I think I did.

Q. Did you further testify that Mr. Wallace in ten or fifteen minutes reported to you that he had sold 200 barrels to Ames, a stranger to you; did you so testify? A. I did.

Q. Did you further testify in that suit that you found Carmichael and told him that you had sold 200 barrels of wine at $1.07? A. When you use the words "I had sold" I think that I said to Mr. Carmichael that Mr. Wallace had sold for me.

Q. That will do. Did you further testify in that suit that your warehouse was struck by lightning and your wines destroyed? A. Not at that time, sir.

Q. You didn't? A. Not on the 15th of June.

Q. No, time you testified? A. Oh, yes, certainly, certainly.

Q. Did you further testify (that) on July 10, of 1870, you met Carmichael on the Board of Trade, and that at that time wines had declined from the time the sale had been made, and that Carmichael said that he insisted upon increased margins being put up? Did you so testify, Mr. Moir? A. I did, sir, but—

Q. No matter, you can explain afterwards, it will be time to explain afterwards.

Mr. EDSALL: I think the witness ought to be allowed to
182 fully answer the question? A. If that date is correct my previous statement about being in Chicago the 6th was wrong. It was later than I supposed it was. I am explaining that because it is in conflict with what I have said.

Q. You have not testified to any question of mine that you were here on the 6th, but that may be. Did you further testify in that suit that when Carmichael said that he insisted upon increased margins being put up, that there was but $3 a barrel for margins, that Carmichael told you that Ames construed the contract to a limit of $3 a barrel? Did you testify to that? A. I did.

Q. Did you—? A. One moment. Mr. Carmichael told me that Ames put that construction upon the contract.

Q. That is what I want? A. My instructions to Wallace were to sell regular under the rules of the Board of Trade. The margin should be kept good.

Q. You say that he did tell you that Ames put that construction on the contract? A. There was such talk, yes, sir.

Q. Did you further testify in that suit as follows, that you told Carmichael that that wasn't your understanding? A. I did.

Q. That your understanding was that the margins should be kept good? Did you testify to that? A. I did.

183 Q. And did you further testify that you went up to Wallace on the Board of Trade, and asked him what was his understanding with regard to the contract? A. I think it is probably true, sir.

Q. And did you testify that you there asked Wallace whether his understanding was that the margin was to be $3, or whether the margin was to be kept good, and Wallace told you he understood that the margin was to be kept good? A. I think I did.

Q. Did you further testify that you went then to see if Ames was on the Board of Trade, and that you found him, and when you found Ames, Ames told you he understood distinctly that he was to put up $3 on the margins, and that he declined to increase it. Did you so testify? A. I think it probable, sir.

Q. Now, was all that testimony true? A. It was.

Q. Did you have any other contract or deal whatever with Ames than this one we are talking about? A. These 200 barrels is all I ever had with him.

Q. Did you further testify in that suit that the margin that Ames put up of $600, being $3 a barrel, or (on) 200 barrels, was put to your credit, or your firm's credit in September? A. I don't recollect that I testified to that, sir, it was not.

Q. Didn't you testify in that case that Phillips & Carmichael—? A. One moment. I desire to explain one statement. Do you intend to have me answer that the margin was put up to our credit at the time the contract was made.

184 Q. I will repeat my question. Did you testify in that suit in that trial which I have been asking you about, that Phil-

lips & Carmichael received from Ames his $600 margin? A. At the time of the trial.

Q. Wait a minute—which they placed to the plaintiff's credit it September? A. I think it is probable I did, sir.

Q. That is what I ask you. Was that true? A. I think it was.

Q. And your firm got the money, didn't it? A. Yes, sir.

Q. The plaintiff's firm in this case? A. How is that?

Q. The plaintiffs in this case, Moir & Co.? A. Yes, sir.

Q. Did you further testify in that case that your firm brought suit against Phillips & Carmichael; that you, Moir, demanded of Phillips & Carmichael the money they received from Shufelt for the sale of the wines to Shufelt? A. I never did.

Q. Did you so testify? A. I think not, sir; my demand was—

Q. I am not asking anything but if you so testified. A. I have no recollection of making a demand of that sort.

Q. Mr. Moir, did you not testify in that suit that you personally, and also by letter demanded of Phillips & Carmichael the money they received from Shufelt for the wines? A. My recollection is that I did not.

185 Q. So testify? A. No, sir.

Q. That you did not so testify? A. It is sixteen or seventeen years ago.

Q. That is the whole trouble with this case.

Judge BARNUM: Didn't you so testify in that trial both upon the direct examination and upon the cross-examination that you personally and by letter demanded of Phillips & Carmichael the money they received on the sale of the wines to Shufelt, the wines they got from Lynch and Conklin? A. I demanded money from them.

Q. I want to know what you said then, not what you say now. Did you so testify? A. I demanded the money. That was true.

Q. I move to strike that out.

The COURT: Strike it out unless there is objection.

Judge BARNUM: I ask you if you did not so testify in that suit? A. I have no recollection.

Q. Twice, both on the direct and cross? You have no recollection. And didn't you further testify that you so made the demand upon the defendants, Phillips & Carmichael, for that money personally and by letter within sixty days from the 19th of July, 1870? A. I will have to answer it as I did before. I made a demand for the money.

Q. I move to strike that out.

The COURT: I do not see how this is cross-examination.

Judge BARNUM: Nobody has made that objection.

Mr. EDSALL: I will make it now.

186 The COURT: You are going on at great length.

Judge BARNUM: Did you not testify—

Mr. EDSALL: I will raise the objection.

Judge BARNUM: I withdraw that question. I will put another.

Q. Did you or not learn from Philips & Carmichael that they sold the wines, and sold them to Shufelt? A. I think I did, sir.

Q. Is it or not a fact that Phillips & Carmichael offered to pay you the proceeds of the wines so sold to Shufelt, if you would give them a bond? A. I think they did.

Mr. EDSALL: One moment. That is not cross-examination at all.

The COURT: Do you object to it?

Mr. EDSALL: I object to it.

Judge BARNUM: Let me be heard before you decide that question.

The COURT: You can be heard.

Judge BARNUM: It may make a good deal of difference in this case, whether Moir & Co. at any stage of the proceedings at the time the replevin suit was brought, or during the time it was pending, or afterwards, adopted and ratified the suit as their own, adopted the acts of their agents as their own, whether they originally directed it to be brought or not, a suit for the proceeds of the action.

Your Honor will remember the counsel put in evidence the depositions of Carmichael and Phillips, deceased, on the ground that the plaintiffs, Phillips & Carmichael, in that suit were professedly representing the plaintiffs, and that the plaintiffs were parties to the suit; that Moir & Co. were really and virtually and meritori-

187 ously the parties to that suit, and it was on that theory that he got in evidence those depositions.

Now I want to show that is so.

The COURT: But you cannot cross-examine this witness to meet or rebut the evidence of some other witness. You can only cross-examine him in those matters on which he was examined in chief.

Judge BARNUM: I can take him as my witness.

The COURT: Wait, let me talk a minute. Although it may meet or tend to meet the evidence of some other witness, if objected to the objection should be sustained because it is not cross-examination.

Judge BARNUM: That is not the objeet.

The COURT: Is this cross-examination, calling upon this witness to state what he testified on some other trial?

Judge BARNUM: That is not this question. My present question—

The COURT: I will have to stop you while I talk.

Judge BARNUM: You have stopped me while I was attempting to state what the fact is, what the question is.

The COURT: I will stop you again, stop you altogether, if you don't look out.

Judge BARNUM: I don't know about that.

The COURT: Now, on what point is that cross-examination permissible. It may tend to meet something, but upon what point of the direct are you cross-examining?

Judge BARNUM: I will withdraw the question so as to obviate the discussion.

Q. Did you file in that other suit against Phillips & Carmichael a bill of items in which you claimed "To money re-
188 ceived of H. H. Shufelt for 100 barrels of highwines of ours sold them, $6,400. Credit by commissions $100"? That is dated July, 1870. Phillips & Carmichael to R. Moir & Co., debtor. Didn't you file such a bill of particulars?

Mr. EDSALL: We object, on the same ground, that it is not cross-examination.

The COURT: Do you wish to be heard on that?

Judge BARNUM: Well, it don't make any difference. The court can rule either way.

The COURT: Objection sustained, then.

Judge BARNUM: Exception.

Q. Mr. Moir, did you sign any contract, memorandum, paper or document in connection with this transaction to Ames? A. My instructions to Mr. Phillips—

Q. Answer my question. (Question read.) Please answer that. A. I did not.

Q. You said you did hear of the replevin suits when you came here. You said you were confronted with two suits. That is cross-examination, certainly. Those were replevin suits, one for wines in Detroit, and one for the wines here at the Michigan Central depot. A. I was aware of them.

Q. Did you go around and have a talk with the people at the National Bank of Commerce with reference to the wines replevied? A. I did not, sir.

Q. Did you have a talk with them at all, anybody connected with the National Bank of Commerce, in regard to these
189 replevied wines? A. At Mr. Carmichael's request.

Q. I don't care at whose request. A. At Mr. Carmichael's suggestion I went over to the old Court House, and had about five minutes conversation with Mr. Goudy, the only one I spoke to in connection with it.

Q. Did you learn at that time and on that visit that this National Bank of Commerce had a claim, a lien, or claimed a lien upon these wines for advances made upon drafts and bills of lading

upon these very wines? A I learned that some bank had advanced on them. I don't know as I charged my memory with what one.

Q. At that time you learned so? A. Yes, sir.

Q. You did not personally make any demand upon Mr. Ames for your money, did you, or this money you are suing for now? A. I did not.

Q. Never did, did you? A. I never saw Mr. Ames from the time I had the last conversation with him on the Board of Trade until I saw him here on Monday morning.

Q. Then no would have answered that question? A. I don't know but it would.

Q. Do you know, of your own knowledge, of your partners, or either of them, making any demand on Mr. Ames for that money? A. I do not.

Q. Were you carrying on business here in Chicago as a member of the Board of Trade for all the period of time from 1870
190 to this time? A. I think I have, sir.

Q. How soon after you learned of the sale of these wines that were replevied, the sale of them by Phillips & Carmichael to Shufelt & Co., did you bring suit against Phillips & Carmichael for the proceeds? A. O, the papers or the records will show.

Q. Well, come as near as you can? A. Inside of six months.

Q. You won that suit in the court below and got judgment? A. We did.

Q. For how much money, about? (Witness hesitates.) No matter, if you cannot remember? A. Well, if the court will permit me to explain—

Q. I will withdraw the question.

Mr. EDSALL: Then withdraw the question and answer too.

Judge BARNUM: That is not necessary.

Mr. EDSALL: I am willing it should all be stricken out. If you are going to prove by parol the winning of the suit below, we want to prove by parol the reversal of it.

Judge BARNUM: You proved it on the direct.

Mr. EDSALL: I understand that is stricken out?

Judge BARNUM: It is withdrawn.

Mr. EDSALL: It may be stricken out.

Judge BARNUM: You were not in Chicago at the time of the purchase of the wines to supply this order of Ames? A. No, sir.

Q. Did you after learning that Phillips & Carmichael had
191 replevied these wines at Detroit, and these wines here in the Michigan Central depot, instruct Phillips & Carmichael to

make a demand upon Ames for the price of the very same wines? Just answer that and nothing else. A. I have no recollection of having done so.

Q. Were your partners then in Chicago—either of them or both of them? A. Not at that time, I think.

Q. Did you ever instruct Phillips and Carmichael to make a demand upon Ames for the price of these goods? A. We put that in a different form. We demanded it from them.

Q. I see you did. That is what I wanted to prove. How long were you experimenting upon that demand? How long did it last? A. Oh, about as long as you legal gentlemen can make up your mind about what course to advise a client to pursue. I was at that time acting under the advice of counsel.

Q. You didn't have the same counsel you have now? A. No, sir.

Re-direct Examination by Mr. Edsall.

Q. There was a question as to whether you instructed Phillips and Carmichael to make a demand from Ames for these wines. State what instructions, if any, you gave Phillips and Carmichael when you were here in July, 6th to 10th, whatever the date was, about what they should do in regard to delivering the wines and collecting the money?

192 Mr. REID: We object, your Honor, to that question, unless Mr. Ames knew of these instructions.

The COURT: No; that is proper enough.

Mr. REID: Note the exception.

The COURT: What instructions he gave to his agent about delivering the property? A. My instructions to Phillips & Carmichael as our agents covered the case entirely, to margin, make the contract, deliver and collect for us.

Mr. EDSALL: Collect what? A. I did not consider that it was necessary to repeat to business men an instruction that was understood by both sides. It was to collect the proceeds of whatever wines were delivered on the contract.

Q. According to the contract price? A. Certainly.

Q. And you were informed they got rid of those wines without collecting the money? A. It appears to be the case.

Q. And that is why you sued them? A. That is it.

Q. You said that you did not sign any contract yourself. Were you here when the papers, the written contracts, were made? A. I think not, sir.

Q. Who represented you in making and signing the written contract? A. Phillips & Carmichael had full authority to do it.

Judge BARNUM: I do not understand what you mean; sign what in your name? A. The original contract.

193 Q. To sign them in your name? A. Yes, sir.

Mr. EDSALL: You were examined about dealing on the Board of Trade in highwines. What highwines did you deal in on the Board of Trade, whose manufacture? A. Nothing but our own.

Q. You simply came to the Board of Trade to sell your own highwines? A. Yes, sir.

Mr. EDSALL: State what business you actually did on the Board of Trade, the character of the business? A. As a member of the Board of Trade I had a right to employ brokers to sell our own manufactures, which, under the then existing law exempted us, I think, from a two per cent. commission that commission merchants had to pay if they sold as third parties.

Q. You did not deal in other wines than your own manufacture? A. Not at all.

Q. It was simply to sell those? A. Yes, sir; that is all.

Q. And you, to facilitate the sale of your own wines, became a member of the Board of Trade? A. That was my purpose.

Judge BARNUM: One question on the re-cross. Did you instruct Phillips & Carmichael to sign contracts with Ames in your name? A. Oh, certainly. May I ask the indulgence of the court to explain one matter that is perhaps a little cloudy in the minds

194 of the jury? The gentleman has by implication held out the impression that we sued for the price of the wine. I swear that my recollection is that we sued upon the draft which Phillips & Carmichael drew for the money.

Q. I will leave it to the general. The 67th Illinois reports shows better than that. A. I am testifying now to what my recollection is.

Q. Your explanation needs explanation. A. I am willing for it to go as my recollection to-day to this jury.

Mr. EDSALL: It don't make any difference.

The COURT: Is that all?

Mr. EDSALL: You never got any money of Phillips & Carmichael by virtue of such suit? A. Oh, no, not a penny. This margin money was not sufficient to protect us in the difference of the price of the wines that we sold at, and what they were worth, when the contract was fulfilled as far as it was fulfilled; not sufficient to cover.

Q. You have never been paid by Phillips & Carmichael as I understand you, anything for the sixty-four hundred and (whatever it was) dollars which you paid? A. Not a dollar.

Judge BARNUM: You never returned the $600 did you, of margins? A. Whom to?

Q. To Ames. A. Why did we?

Q. Did you or not? A. I didn't know whether I would meet Mr. Ames in Canada or where; we did not.

Q. You did not? A. No, sir.

195 The plaintiff then rested—and thereupon the defendant, to maintain the issues on his part, introduced the following evidence, to wit:

WILSON AMES, the defendant herein, having been first duly sworn on his own behalf was examined in chief by Mr. Reid, and testified as follows:

Q. State your name and whether you are the defendant or not in this case? A. Wilson Ames. I am the defendant.

Q. Where do you reside at the present time? A. Chicago.

Q. How long have you resided here, continuously from this date back? A. Oh, for ten or fifteen years.

Q. What, if any business have you been engaged in during that time? A. I have been treasurer of the Phœnix Distilling Company, ever since it was organized eleven years ago.

Q. When was that, if you remember? A. Well, that is eleven years.

Q. About eleven years? A. Prior to that I was traveling several years for Dickinson, Leach & Co.

Q. Have you been a stockholder at any time in that company that you are treasurer of now? A Ever since it was organ-

196 ized eleven years ago.

Q. Is there a record of the amount of stock held by you kept at the government office in Chicago, a public record?

Mr. EDSALL: I object. I do not see any pertinency to that.

The COURT: Do you object to this Mr. Edsall?

Mr. EDSALL: Yes, sir.

The COURT: What is the object of this?

Mr. REID: I wish to show Mr. Ames is a business man and owns property, and it is a matter of record here and has been for several years.

Judge BARNUM: One of the witnesses whose deposition was read in evidence by Mr. Edsall, testified, that the reason that they did not sue on this claim fourteen years old was that this man was "busted" and afterwards became a millionaire. Now, we want to show that at any time during the last ten or twelve years he was responsible, and known to be such.

The COURT: The time of bringing suit is wholly immaterial, whether it was ten years or twenty years old, unless the statute of limitations has run.

Mr. EDSALL: It was on their cross-examination they drew that out.

Judge BARNUM: That is our reason for—

The COURT: The objection is well taken, and is sustained.

(Exception by defendant.)

Mr. REID: Mr. Ames, where did you reside in 1870, in the month of June? A. I was here in Chicago.

Q. What business were you engaged in then, if any? A. 197 In the liquor business, on River street.

Q. Wholesale or retail? A. Wholesale.

Q. How long previous to that time had you been engaged either alone, or in connection with other firms? A. Well, several years. About two, perhaps.

Q. Do you remember at any time of making a contract or agreement of any kind regarding the purchase of any property from Moir, any highwines from the plaintiffs in this case? A. I do.

Q. If so, state when it was, and where it was, as near as you can? A. It was on the board of trade I made an agreement. On the board of trade I made an agreement to take 200 barrels of wines at $1.07 per gallon.

Q. Whom did you make that agreement with?

Mr. EDSALL: I do not know exactly what they are after; but the point I wish to raise is this: We have sued here upon a written contract described as such, and proven as such, and the pleadings do not deny the making of that contract under oath, and it is proven. I object to the evidence of a parol contract one way or the other.

Mr. REID: The pleadings do not deny under oath the signing of that paper. We deny there was ever a contract. It is for the court to determine what the paper is, whether it is a contract or not.

The COURT: That is for the court to say.

Mr. EDSALL: They raised that question on their demurrer.

198 The COURT: Is that paper for 200 barrels or one? A. One; the only one here in evidence.

The COURT: Are you seeking to show another agreement?

Mr. REID: No; Mr. Moir testified there was only one contract, one paper which was for 100 barrels of highwines. We claim this paper was not a contract. It was a memorandum of some sort or other.

The COURT: How can you deny that? It purports to be made by the defendant, his name is attached to it. How can you attack it unless you file an affidavit denying its execution?

Mr. REID: We do not deny we signed that paper. I am asking about a contract, not that paper.

The COURT: You are talking about some contract for 200 barrels of highwines?

Mr. REID: Yes, sir; and the only contract made.

Judge BARNUM: We are, in other words, trying to prove our plea of general issue that we did not make any such contract as is declared on, but another and entirely different one. I know, without doubt, that your Honor will agree with us if you will listen to the authorities. We are offering to show under the general issue a thing we have a right to show. We have a right to show that the plaintiff has no cause of action, and if he had, it has been extinguished. We have a right to show all that. We have a right to show the contract declared on was never made, whether in writing or not, it was never made; and we are offering to show that the 100 barrels of highwines for the price of which they are attempting to sue here are part and parcel of the 200 barrel lot that
199 was sold at one and the same time by a word of mouth contract on the board of trade by Moir, through Wallace, to this gentleman. That is what we are trying to show.

Judge BARNUM: Will you state the contract that you say you made for the purchase of these wines on the board of trade with Mr. Wallace? Go on and state it.

Mr. EDSALL: We object to any oral contract.

Judge BARNUM: That is, the wines in controversy in this suit.

(Objected to by plaintiff on the ground that if they propose to prove an oral contract different from that set out in the declaration, that it is incompetent in this case.)

Q. (Question read.)

(Objected to by plaintiff on the ground that the contract declared upon and proven is in writing, and it is incompetent to prove any different contract by parol.)

Judge BARNUM: The proposition is to prove that the contract was by word of mouth, and was for two hundred barrels, for two hundred barrels, which included this 100 barrels, and was not, and never was, a contract for one hundred barrels. We propose to disprove and contradict the avermens of the plaintiff's declaration.

(Objection sustained. Exception by defendant.)

Mr. REID: Did you ever make any contract with the plaintiffs in this case through any person, or through any agent of theirs, for one hundred barrels of highwines, the purchase of one hundred barrels of highwines?

200 Mr. EDSALL: I object if the proposition is to prove an oral contract before this paper declared upon was made to vary its terms.

(Objection sustained; exception by defendant.)

Judge BARNUM: We propose to prove that he never made a contract for one hundred barrels.

The COURT: That I think you cannot do, under your pleadings.

(Exception by defendant.)

Mr. REID: Did you ever meet Robert Moir, or any member of the plaintiffs' firm at any other time than the one you have mentioned when you first met him on the Board of Trade? A. I don't recollect of having met him but once. It is a good while ago, but if some circumstance should come up that would refresh my memory, I might admit it—I might recollect it.

Q. Did you ever make any other contract for the purchase of highwines from Robert Moir and Company, the plaintiffs in this case, either from them personally, or any member of the firm personally, or through any agents of theirs? A. No, sir.

Q. Mr. Ames, at the time you made this purchase, was there a general speculation being indulged in by dealers in highwines here in the city of Chicago?

(Objected to by plaintiff as immaterial.)

Mr. REID: We want to show your Honor that at that time there was what they call a flurry on the Board of Trade in regard to highwines, and people were crazy, and were entering into all
201 sorts of contracts, and making numerous contracts, and he caught the fever, and he made contracts, and Mr. Moir caught the fever, and he made one.

(Objection sustained; exception by defendant.)

Q. Mr. Ames, at the time you made this contract, or made any contract with Robert Moir & Company for the purchase of highwines, what was the state of your financial condition at that time?

(Objected to by plaintiffs as immaterial; objection sustained; exception by defendant.)

Mr. REID: They have got in proof under the replication wherein they have tried to show fraud upon our part, and now I want to show that the transaction was fair, honest and straightforward; that he was a man of capital, and went into it with honesty; that he got caught in a declining market and was unlucky and failed. I want to show our good faith in entering into this contract. They have certainly attacked our good faith.

(Objection overruled; exception by plaintiffs.)

Mr. EDSALL: We object on the ground that there is no claim that he was then insolvent.

The COURT: Well, you may answer. State what was your condition?

A. I was solvent.

Mr. REID: How much did you consider yourself worth at that time?

(Objected to by plaintiffs as immaterial; objection overruled; exception by plaintiffs.)

Q. Well, that is, that time the contract was made? A. Yes.

202 The COURT: How much was he worth, I suppose?

Mr. REID: Yes, sir.

A. More than $10,000?

Q. How much more? A. Well, I don't know. It is a good while ago. I presume twice that.

Q. How did your financial condition continue after that down to the time that they levied the execution upon you? A. Why, I was solvent clear up to the time of the judgment being taken against me and the property sold out at ten per cent. of what it cost.

Q. During this time, during the month of June, did you make any other contracts or make any other purchase of highwines?

(Objected to by plaintiffs.)

A. Yes, sir.

The COURT: I don't think that is material. The objection is sustained.

Mr. REID: Did you receive any other highwines for delivery? A. Yes, sir.

(Objected to by plaintiffs.)

Judge BARNUM: This comes down to the time of these deliveries. We want to show that he was receiving deliveries right along on the day before, two days before, and right along down to this time. It will tend to show that there was nothing singular, suspicious or peculiar in the fact that he sent out these highwines east, any more than there is that he received at the same time.

The COURT: Go on. He may show that he sent off other

203 highwines in the same manner.

(Exception by plaintiff.)

Mr. REID: During the month previous and including the 18th of July, 1870, how many days will you say that you were receiving highwines delivered at your place, and delivering them out?

(Objected to by plaintiff as immaterial and irrelevant; objection overruled; and exception by plaintiffs.)

A. I cannot say just how much I was doing, but I was doing it right along during the month of July.

Q. On the 18th of July did you have a large quantity of highwines on hand at your place of business? A. Yes, sir.

Q. And on the 19th, too? How is that? A. Yes, sir.

Q. About what quantity did you have? A. Oh, there was more than another hundred barrels. I can't tell just how many.

Q. Was the floor full? A. Yes, the floor was full. If I may

be allowed to state, I noticed in Mr. Maynard's testimony in something I read over in the former case, he said I shipped—

(Objected to by plaintiffs.)

The COURT: State what you know yourself.

A. I can't tell just how many. I was doing it along every few days.

Mr. REID: Had you previous to this time made any arrangements with any parties in New York or elsewhere east to receive consignments from you, and make you advances upon high-
204 wines?

A. I had.

Q. Had you just previous to this time been in the habit of consigning highwines to this party and making drafts, and attaching them to bills of lading and having them discounted? A. I had. I went to New York with that express purpose, to make an arrangement to have the wines carried in New York, and not here.

Q. Will you state why you made arrangements to have the wines kept in New York rather than having them kept here? A. Because I needed money from parties, and the rate of interest was ten per cent. here, where it was seven per cent. there. There was a big saving in the cost of having them by having them carried in New York, and whenever they were wanted, east was the market, either New York, Philadelphia or Baltimore. There was ten barrels of that class of goods there to one here.

Q. How was it about insurance? A. I don't remember that there was so much difference in insurance, but there was a little difference.

Q. How was it in regard to other distilleries here engaged in the same line of business? Was there a custom in that regard at that time? A. The largest house here had sent on theirs and I followed after their tracks. The largest house here I knew had several thousand barrels shipped down there for that very purpose.

Mr. EDSALL: I don't see as that is immaterial. I did not see what he was driving at. I ask that that last question and an-
205 swer be stricken out; what other houses did in shipping down there, or the course in New York.

Judge BARNUM: We did nothing contrary to the custom or suspicious, and I would like to prove it.

The COURT: If other houses were receiving wines in that way, and immediately, the very next morning, shipping them out, it might be admissible.

Q. Do you know whether or not it was the custom, or frequently the custom here, for dealers in highwines, in the same class of trade that you were in, when they have been cash sales, or what

were called cash sales, to have the highwines delivered directly from the seller to the depot?

(Objected to.)

Q. And sent off immediately, and bills of lading attached and drafts drawn immediately upon them before they were paid for?

(Objected to by plaintiffs; objection overruled; exception by plaintiffs.)

A. Why the house I spoke of that was shipping down there was the North-Western Distilling Company, and they had several thousand barrels shipped down there. Now, I can't say they received the wines and shipped before they were paid for, because I don't know just how they done their business; but I know they shipped thousands of barrels down there. They had more than five thousand barrels in the east.

Q. Did you know of any instance, either yourself or other parties, where goods had been delivered, in possession of the buyer, and where they had been shipped off and transferred without paying for them, previous to paying for them?

(Objected to by plaintiff as immaterial and incompetent.)

206 About that time?

The COURT: If it was the custom among dealers to purchase goods and have them immediately shipped East, I think that would throw some light upon the question of whether he acted fraudulently as the plaintiff claims, in sending off these goods immediately. He may state it, but I do not think a single instance is sufficient.

The WITNESS: I know that to be the usual practice, and in this case the instructions were—

(Objected to by plaintiffs.)

Mr. REID: Did they, according to the custom here prevailing at that time, among dealers of highwines, did the sellers generally collect their pay before they delivered the goods into the hands of the purchaser on cash sales?

(Objected to by plaintiffs as before; objection overruled; and exception by plaintiffs.)

Q. Did they collect before the goods were delivered? Before they put the goods into your manual possession? A. I never knew an instance that they did.

Q. State what the custom was in that regard on cash sales so called? A. The wines were delivered one day and invariably collected for the next day. The bill with all the government papers, coupons, and inspector's certificates were brought together and then paid for.

Q. And how were they generally paid amongst merchants and dealers, in cash or in checks? A. By checks, invariably.

207 Q. Were the bills always presented on the next day, or sometimes later? A. Oh, they might be later.

Q. What was the general custom? A. The general custom was the next day.

Q. When you sold goods, if you did sell any at all on cash sales, how did you act in regard to collecting your pay? A. I never presented a bill the same day, nor I don't think I ever had one presented to me the same day when I bought.

Q. Will you please state where your family was during the months of June and July, 1870? A. They were East.

Q. How long had they been there? A. In Chester, Massachusetts. My wife went to Chester, Massachusetts.

Judge BARNUM: Come as near as possible to the time? A. January.

Mr. REID: Did they continue to reside there? A. She was taken sick there and did not come back here until after July sometime.

Q. Where was your residence during that time? A. It was here.

Q. Up to what time? When did you change? A. Why, about 1872 I think it was; 1871 or 1872.

Q. You moved from here, changed your residence from here down East, did you? A. Yes sir. I went to traveling for Dixon, Leach & Company, and I was down there—my business took me down there a good deal, and so I changed down there and came out here once, in a couple of months, say three months, perhaps.

208 Q. On the 18th of July, 1870, where were you during that day if you remember? That is, the day they claim that they delivered goods to you? A. Well, I was in Chicago. I was at my place of business.

Q. Where was that? A. 13 and 15 River, I think it was.

Judge BARNUM: River street? A. Yes, sir.

Q. Where were you on the 18th, if you remember? A. I know I was at my place of business.

Q. Was you there the greater part of the day? A. Yes, sir.

Q. How late were you there, if you remember, and state any instance why you remember the time you left? A. The reason I know what time I left there is this; they all say that the last of the wines was not delivered there until about 6 o'clock, and I left there just about as the last wagons drove up, and had started towards South Water street on River, and there met Phillips & Carmichael.

Q. What did you say to them, or they to you? A. They were in their buggy and I was just going to cross the street and it happened so that I walked right along just even with their buggy as

they got across the street, and they asked if the wines were delivered all right, and I says, "Yes, I guess so; why didn't you deliver them to the Michigan Central road, as I told you?"

Q. What did they reply to that?

209 (Objected to by plaintiffs as incompetent; objection overruled; exception by plaintiffs.)

Q. What did they say to that? A. There was no long conversation; just called and they went on.

Q. State if at any time previous to this 18th you had made any request of them as to where they should deliver these wines? A. At the time I told them to deliver it all—I said, "Deliver them to the Michigan Central Road."

Q. How many? A. One hundred barrels, to save cartage.

(Objected to by plaintiffs; objection overruled; exception by plaintiffs.)

Q. What did they say at your request to deliver them at the depot? A. I can't tell just what they said.

Q. State the substance? A. They gave me some evasive answer that they delivered them to the store where the agreement was.

Q. How many men did you have in your employ at your place of business at that time? A. I should think about three or four, possibly five.

Q. Did you have a book-keeper? A. Yes, sir.

Q. What was his name? A. B. W. Kendall.

Q. Do you know whether he was there that day or not? A. I know he was.

Q. How much of the day was he there on the 18th? A. Well, it is a good while ago, but my recollection is that he was there as usual. I know he was there as usual, in fact.

210 Q. How was it the next morning? A. I know he was there as usual.

Q. What time did you get there the next morning? A. At the usual time. I presume 8 o'clock.

Q. Did you give any orders when you went there in regard to the shipment of wines? A. Yes; well, that night or that morning I gave orders to have them shipped—sent to the Michigan Central Road.

Q. And state if you know up to what hour in the day the Michigan Central Railroad Company would receive freight at its depot, and give bills of lading at that time? A. They never would receive it before 7 o'clock in the morning, or after 6 o'clock at night.

Q. Were any of these goods received, this 100 barrels of high-

wines, shipped from your store during the 18th? A. No, sir; not a barrel.

Q. Were any of these goods shipped from your store on the 19th before 7 o'clock in the morning? A. No, sir.

Q. How long would it take to transport the one hundred barrels of highwines from your place of business to the Michigan Central freight depot? A. Why, it would be six dray loads or truck loads, and it would take them, I suppose, not more than five minutes to roll on sixteen barrels, and the drive wasn't more than five minutes more from there to the depot. There would be six loads of them.

211 Q. Were they shipped in the morning? A. Yes, sir; they were.

Q. Did you ship any of those wines or any other wines out of your place at night? A. Never.

Q. That night? A. No, sir; never. The government would not allow it.

Q. Did any highwines leave your place of business after half past five that afternoon? A. No, sir.

Q. On the 18th? A. No, sir. The government won't allow it. The wines are liable to seizure if they are found on a wagon after sunset.

Q. Were the wines all there in the morning when you got there? A. I don't think so. My recollection is that—in fact I think the boys were rolling them out when I went in.

Q. You had given the order then, I understand, the night before? A. Yes, I am satisfied now I gave them the order the night before.

Q. Whom did you tell, Phillips or Carmichael, or both of them, that you wanted the goods delivered to the Michigan Central depot? A. Well, my recollection is that most of my business was done with Mr. Carmichael. I don't think I knew Mr. Phillips at all. I don't know whether I ever spoke to him, in fact.

Q. What did you do the next morning, on the 19th, when you got to your store, if you remember? A. Well, after the goods were all shipped, and went out and got the railroad receipt, the teamster had brought back the receipt for the goods, it was

212 taken—I don't suppose I done it, but it was taken to the bill of lading office and the receipt surrendered and the bill of lading got in its place, and the book-keeper made up a draft on W. S. Miller & Company for the goods, and either he or I took it to the bank, I couldn't say which.

Q. Had you previous to that time made arrangements with the

bank to discount paper of yours of that kind with bills of lading attached? A. Yes, sir.

Q. Had you been doing it right along? A. Yes, sir. I had done as far back as—well, prior to the 1st of May; I think it was about the 1st of May the concern changed from Miller, Ames & Company to Wilson Ames. Wilson Ames & Company did the same thing to the same concern in New York. They shipped goods on consignment there, and they were then to be carried in New York. They were carried for months after that.

Mr. EDSALL: I object to that and ask that that last question and answer be stricken out.

The COURT: I think whatever he was in the habit of doing, is proper enough to be shown as tending to show that there was nothing out of the way, but how the firms did perhaps would be objectionable.

Judge BARNUM: It was a firm of which he was a member. That is the way it came in.

(Objection overruled, and exception by plaintiffs.)

Mr. REID: Did you see Phillips & Carmichael, or either of 213 them, on the 19th, or at any time after, of July, 1870? A. No, sir, I did not.

Q. Did they come to your place of business while you were there? A. No, sir, they did not.

Q. What time did you leave there in the morning, if you remember? A. Well, not until after nine o'clock, any way.

Q. Mr. Goudy has testified that there had something been said on the former trial about your being at the bank there with bills of lading about half-past eight. State whether that is true or not?

(Objected to by plaintiffs as improper.)

The COURT: Let him state what time he was there.

Mr. REID: Is that true, or not?

(Objected to by plaintiffs as improper.)

The COURT: He may state what time he was there. It is not called upon to deny what other witnesses may have said.

Mr. REID: How long was you there, if at all, before the bank opened? A. At the bank?

Q. Yes, sir, with the bills of lading? A. Not until it opened.

Judge BARNUM: If your Honor will allow me at this point, I will make a motion to exclude what Mr. Goudy said on that point, because it was hearsay. Mr. Goudy did not pretend to say that he knew it. He said somebody said so.

The COURT: I think he testified that some one stated that on the trial.

The WITNESS: The bank did not open until 10 o'clock.

214 Mr. REID: Well, sir, were those drafts and bills of lading then deposited? A. Yes. sir.

Q. What did you do then? A. I can't say that I deposited them. I don't recollect that they were deposited by me.

Q. Go on and tell what you did that morning, that forenoon, as near as you can remember at this late day? A. I recollect being up there to the bank, and I presume I carried the drafts, and probably about ten o'clock, somewhere, but I can't just state now when it was, but I think it was before I got back to the store, somebody told me the sheriff had levied on my store.

Q. What did you do then? A. I went over to the store.

Q. What did you find? A. I found the sheriff there.

Q. Under what?

Judge BARNUM: An execution? A. Yes, sir.

Mr. REID: An attachment, or execution, or what? A. An execution.

Q. Well, what did you then do? How big a judgment was it, if you remember? A. I have forgotten, but it was a pretty large judgment.

(Objected to by plaintiffs as improper.)

Q. What did you do next? A. It is so long ago it is impossible for me to tell how large the business was.

215 Judge BARNUM: Was it a large judgment, or a small one? A. It was a large judgment.

Mr. REID: Had you up to this time seen Carmichael or Phillips? A. No, sir.

Q. Had you up to this time seen any one representing Conklin & Brother, or Lynch? A. No, sir.

Q. Did Phillips and Carmichael, or the plaintiffs, or any one representing any of them, or Conklin and Brother, or Lynch, or any one representing either of them, ever call upon you to pay the bill for any of these highwines? A. Never been asked to pay it sir, to this day by anybody.

Q. On that day or any other time? A. No, sir.

Q. What became of your money that was placed to your credit upon the discount of those drafts? A. As soon as I learned that the sheriff was in possession of the store, I drew a check for $6,000 to Barnes, who was then in the store, of Akron, Ohio. He was there, and he says "Here, the sheriff is in possession. Now I want you to take care of me." And I drew a check and gave it to him. Barnes of Ohio was there and insisted upon his money which I owed him. He was endorser for me, and I drew a check for $6,000 and gave it to him.

Q. Was he a stranger, or did he belong here? Did he live here? A. No, sir, in Ohio.

Q. Well, what did you do then? Did you go to the bank with him? A. I think so.

Q. What for? A. To identify him.

216 Q. Did you identify him? A. I think so.

Q. Was he a creditor of yours at that time? A. He was.

Q. To that amount? A. Yes, sir.

Q. Or more? A. And more.

Q. Why did you give him his check rather than any one else should get this money? A. Because I would rather he would be; I thought it was my duty to pay him before somebody else. I preferred to pay him rather than to pay somebody else.

Q. Did you understand at that time that you, as a debtor, had a right to prefer a creditor if you wished to?

(Objected to by plaintiffs as incompetent and improper. Objection overruled, and exception by plaintiffs.)

(Question read.)

A. Yes, sir, I thought I had.

Q. Did you act in good faith in that matter?

(Objected to by plaintiffs as incompetent, and on the ground that it is a question for the jury to pass upon. Objection overruled, and exception by plaintiffs.)

A. I did.

Q. What was the result of the levy of this execution upon
217 your place of business as to your continuance in business? A. Why, it stopped my business.

Q. What result did it have upon your credit as a merchant here in the business community? A. It killed it.

Q. Was your property sacrificed by selling under the execution?

(Objected to by plaintiffs as immaterial. Objection overruled, and exception by plaintiffs.)

Q. If, at that time, you had concluded to go on in business, if your credit had not been destroyed, could you have procured the money if you had been called upon by these parties to pay them?

(Objected to by plaintiffs, and objection sustained.)

Q. Did you have a standing arrangement by which you could get money from the east when you wanted it? A. I had.

(Objected to by plaintiffs, who asked that the answer be stricken out. Objection overruled, and exception by plaintiffs.)

A. I had parties in the east that would furnish me plenty of money to pay all of these, and as quick as I made settlement with my creditors, they did furnish me with nearly $50,000, more than $25,000, with which I started in business.

(Plaintiffs moved to strike out the answer as immaterial.)

The COURT: What they did may be stricken out, but his condition at the time I think they have a right to show.

218 Mr REID: What was the condition of the market in regard to highwines here in Chicago on or about the 18th and 19th of July, 1870?

(Objected to by plaintiffs as immaterial; objection overruled and exception by plaintiffs.)

Q. The question is, what the condition of the market as to highwines was? A. Why, there had been a drop. Well, I can't state just whether it was that day or not.

Q. What was the result upon dealers generally in Chicago, here, who were speculating in highwines?

(Objected to by plaintiffs as immaterial; objection sustained.

Q. What was the result upon you? A. Why, the parties that put the sheriff in, said that was the reason why they put him in, that I could not stand it.

Q. What was the state of congressional legislation upon the tax at that time, on that very day?

(Objected to by plaintiffs as immaterial.)

The COURT: I think that is too remote. Anyhow, the law would be the best evidence. The objection is sustained to that.

Mr. REID: We want to show that Congress adjourned on that day, on the day he made the call, and up to that time everybody had been believing that there would be a government tax and increased tax placed upon highwines, and upon their adjournment the bottom dropped out.

(Objection sustained and exception by defendant.)

Q. Why did you buy these wines?

219 (Objected to by plaintiffs as immaterial; objection overruled, and exception by plaintiffs.)

A. I bought them to sell again.

Q. Under what expectation? A. An increase of tax.

Q. Did you buy them in large quantities from numerous dealers?

(Objected to by plaintiffs as immaterial; objection overruled.)

A. I had on that day 150,000 gallons that was bought on speculation, believing that the tax was going on.

Q. Now, state if anything was said between you and Mr. Carmichael, or the firm of Phillips & Carmichael, on the 15th, in regard to your not taking the highwines and not delivering them? A. When I called for them, he told me that the wines had been burned, and he would cancel the contract if I wished, upon paying some small amount; I don't recollect the amount. I told him I would cancel it and let him keep the $600 and nothing more. He said he would deliver them before he would do that.

Q. That is what he said at that time? A. That is what he said at the time.

Q. At the time you made the call on the 15th? A. At the time I made the call I offered to cancel the contract, and let him keep the $600.

Judge BARNUM: But he wouldn't do it?

A. Yes, sir, he refused to do it; $600 was the amount of money he had up in his hands as margins.

Q. What did they say at that time about the highwines, about delivering them? A. Well, at that time I don't know as he
220 said anything about delivering, but some time prior they asked me the privilege of delivering them.

Q. What did he say about the delivery? A. He wanted I should take them.

Q. What did you say? A. I said I was not ready.

Q. What reply did he make then? A. Well, "You have got to take them after the 20th."

Q. Mr. Ames, at the time you called on Phillips & Carmichael for these wines, did you say anything to him or them as to your wishing to have them for distilling purposes? A. I did not.

Q. Why did you make the call? What did you say to them? A. I told them that they could deliver 100 barrels of the 200 at Michigan Central depot.

Q. I asked you why, what you said to them? A. What I did say to them?

Q. Yes. I understood you to testify yesterday that you did not wish to take the wines, and wanted them to settle the differences? A. I said if I had got to take them, you can deliver them at the Michigan Central depot. Otherwise you can keep the $600 and cancel the 200 barrels.

Q. And they declined the latter proposition? A. Yes, sir, they declined.

Q. When was the next time you had any talk with Phillips & Carmichael, or either of them about those wines? A. After
221 I called them, you mean? After I told them to deliver?

Q. Yes. A. It was the evening that they did deliver, about a block from my office. I met them on the street. They were in the buggy and I was on the street, and I walked right up to their buggy.

Q. You have already told that? A. Yes, sir.

Q. When was the next time you had any talk with either of them about the wines? A. Well, it was some time later. It might have been a week or two or perhaps a month.

Q. After the replevin suit was brought? A. After the replevin suit was brought, after they brought the replevin suit for the wine.

Q. To whom did you then talk? Which one, or both? A. Mr. Carmichael.

Q. What was said?

(Objected to by plaintiffs on the ground that what was said between Phillips & Carmichael and the defendant after the wines were delivered and shipped away and the replevin suit was brought, cannot bind the plaintiffs in this case.)

The COURT: How would that affect the plaintiffs in this suit?

Judge BARNUM: It is a part of the history of this case. If they are going to claim the benefit of the action of their agents, they must take the whole of it. The proposition is this, a settlement of the subject-matter of that suit with reference to those
222 highwines, was made by Ames between him and Phillips & Carmichael during the pendency of that suit, by the terms of which settlement and compromise they were to keep the $600 which had been put up, and they were to dispense with the necessity of calling him in their suit, and did not call him, and told him they would not call him, and settled with him all claims whatsoever for the $600, with reference to the whole subject-matter of that suit.

The COURT: Do you expect to show that was done with the authority of the present plaintiffs?

Judge BARNUM: I have made this offer just as it is. That is all I can make. I think the legal effect of it is already in evidence, in my judgment, and what will be in evidence will be that it was an act within the authority of these agents. I do not expect to show that Moir, or either one of his partners, came to them or wrote to them to do, or to say exactly those things with reference to these wines and that lawsuit. I do not expect to show that, by the testimony of this witness; but I maintain if they undertake to claim, as they have done, to get the depositions in evidence of dead witnesses in that case, as they have done and suceeeded in doing, on the theory that they were the virtual plaintiffs in that suit, then they thereby have adopted the acts of Phillips & Carmichael with reference to that suit; and if Phillips & Carmichael were responsible for the costs of that suit in case of failure, and had control of the suit, had to give a bond in the suit and had to become personally responsible and so forth, we maintain that under those circumstances, we have the right to prove a compromise of that suit
223 with them, and if they made a compromise with them which was not for the benefit of their principals, that is a matter between them and their principals. We only wish it to go in evidence for what it is worth. It may or not bind them. It is part of the history of this transaction.

The COURT: It is not worth anything. It would be misleading to this jury. It is a well established principle that an agent cannot bind his principal except within the scope of his authority, or apparent authority, and even an attorney cannot compromise a case for his principal without authority. There is no evidence that I now recall before the court that Phillips & Carmichael had any authority to commence—that is authority direct from the present plaintiffs either to commence the replevin suit, or to carry it on; certainly not to compromise it.

Judge BARNUM: On what ground did your Honor let in the testimony of Phillips & Carmichael except on the ground they were virtual parties to this suit?

The COURT: They had an interest in that suit, it is true, but they cannot settle it as far as a compromise is concerned, unless they had authority from their principals.

Judge BARNUM: I offer to prove they offered to compromise their own suit for the wines they took from him.

The COURT: I don't suppose anybody disputes that. It is not germain to the issue here. The objection is sustained.

(Exception by defendant.)

Judge BARNUM: I make the proposition and offer to prove that in this conversation that I am now asking to have the witness detail,

224 Phillips & Carmichael agreed with Ames, the defendant in this case, and in that replevin suit which has been heretofore introduced here, that they would compromise with him, Ames, and they did thereby and then compromise with him that replevin suit, and the claim of Wilson Ames in that suit by the terms of that compromise, by which they were to keep the liquors, Phillips & Carmichael were, and the $600 that had been put up on the 200 barrels as margins, and that that compromise was to be a complete compromise as to the 100 barrels covered by the replevin suit; Ames was to stay away from the city, because they would not call him, and did not wish to call him, and in pursuance of that conversation and compromise, Ames was not called as a witness by Phillips & Carmichael, or anybody else, and that the wines were kept by Phillips & Carmichael, and were not returned to Ames, and that the $600 that was put up on the 200 barrel transaction as margins, were kept by Phillips & Carmichael being the same 200 barrels sworn to by Moir.

Mr. EDSALL: We will object. I will state the grounds.

The COURT: The objection is sustained.

(Exception by defendant.)

Judge BARNUM: Mr. Ames, you have testified that on the 18th you gave orders to have the highwines shipped by the Michigan Central Railroad, didn't you? A. Yes, sir.

Q. To whom did you give that order? A. To my shipping clerk.

Q. What was his name? A. Wilson, I think. I am not sure whether it was Wilson or O'Brien that had that position then.

Q. How many barrels did you order him to ship? A. 100 barrels.

225 Q. In giving him that order to ship 100 barrels, did you or did you not designate what 100 barrels, or whether it was to be the 100 barrels that you were getting from Phillips & Carmichael or not? A. I told him two cars, and did not tell him which ones to ship.

Q. How many barrels of wines did you have there before these came into your place? A. Well, I don't recollect, but twice that amount, anyway.

Q. You had more than enough to have filled an order for 100 barrels without touching these? A. Yes, sir.

Q. And you did not specify these as the ones to be shipped? A. No, sir.

Q. Did you know the next morning when you were at your place of business, or when you went to the bank with the bills of lading, that the wines which had been actually shipped by the clerk, were the very same 100 barrels that you were getting from Phillips & Carmichael? A. No, I did not.

Q. Mr. Ames, how did it happen, if you can state to the jury, that the 100 barrels that were shipped were the same 100 barrels, and not some other 100 barrels or parts of other barrels? A. Because they were the last that were received that night, and would be nearest the door and would go out first. The balance that was in there was to go. My arrangement with the Eastern parties was to take all that I had to go, which was a thousand barrels or more behind yet.

Q. These lay handiest to the door? A. These lay handiest to the door, and the others could not very easily be got at first.

226 Q. When you shipped these 100 barrels of highwines, had you any intention thereby of defrauding the plaintiffs? A. No, sir.

Mr. EDSALL: We object to that.

The COURT: No, he can answer.

A. No, sir.

Judge BARNUM: Or when you got the drafts cashed, did you have any such intention? A. No, sir.

Q. If the execution which you said was levied on your stock on the 19th of July had not been levied, had you the ability by means of those wines to raise *instanter* money enough on them to pay these plaintiffs the price of their wines? A. Yes, sir.

Q. Without reference to the money you got from the bank on the bills of lading? A. Yes, sir, I could have paid it.

Q. You could have paid the check? A. Yes, sir.

Q. The certified check that was given to Barnes on the bank on these bills of lading, and could also have paid the plaintiffs out of the balance of your wines? A. Yes, sir.

Q. Without any other means? A. Yes, sir.

Q. Without the assistance of any other means? A. Yes, sir, the bank itself would never have thrown the check out for
227 $5,000.

Q. I will put this question as referring to your financial condition and credit at and about the very time of the shipment of these wines, and immediately before that. Was the bank in the habit of honoring your overdrafts? A. Checks.

Q. Or overchecks immediately before this time? A. Yes, sir, they were.

Q. And to what extent? A. Why, a few thousand dollars—it never was spoken of.

Q. A little louder. A. If it was not more than a few thousand dollars, I would never speak to them, even.

Q. They would pay a check for as much as a few thousand dollars, although you hadn't the funds there with them? A. Yes, sir.

Q. Or securities either? A. Yes, sir, or securities.

Q. Without funds or securities there they were in the habit of paying your checks to the amount of more than a few thousand dollars? A. Yes, sir, if it was a larger amount, even, they would have paid it, if it was twice the amount, but when they done that, I would go and speak to the cashier or teller, and tell them that it would be made good shortly.

Q. How long had you owed this debt to Barnes that you paid with this certified check? A. Well, I cannot tell, but it was a good while. A portion of it was a $5.000 note that they en-
228 dorsed for me at a bank at Akron, and which they paid at maturity. , It was sometime before, I cannot tell when. It is so long ago, I have forgotten, but I wouldn't be surprised if it was six months before.

Q. How much more did you owe Barnes than you were able to pay by that certified check? A. Well, I have forgotten, but as I recollect it, I owed him a round $10,000 for a long time there. There was a long time that I owed him that amount, but just when it was I do not remember.

Q. Did those two drafts amount to more or less than the market value of the 100 barrels of highwines? A. Oh, it was less. I presume $500.

Q. That is, the wines paid $500 more than these drafts? A. Yes, sir; there was a margin in the wines then of more than $500 I should say, but I have forgotten just the amount.

Q. That was there to your credit in the bank? A. Yes, sir.

Mr. EDSALL: He didn't say that.

Judge BARNUM: I will put the question. Was it the fact? A. Yes, sir; that was my recollection of it. I don't know just how my account stood, but the drafts were drawn for round amounts. One was $2,600 and one $2,900. I know the drafts would not be for $2,600 and so many dollars and so many cents. The wines came to more than the drafts.

Q. It was worth more money than the drafts? A. Yes, sir; there was more money than that.

Q. How is it with reference to these barrels of wine at that
229 time, as to whether they were uniform, all barrels of highwines, as to the number of proof gallons which each barrel contained or different? State the fact? A. Why, highwines were something that run very irregular. One man's highwines might have forty-five to fifty gallons in. Another might have fifty to fifty-five, and another fifty-five to sixty.

Q. Number of gallons? A. Yes, sir.

Q. Proof gallons? A. That is, to measure it with a gallon measure. Some would hold forty gallons, but the proof of some would be four over and that would make—four times four is sixteen—make it hold forty-four proof gallons.

Q. How low, expressed in proof gallons, would a barrel of highwines run on an average? A. Oh, they run down as low as 101, and then run up as high as 150.

Q. What is the smallest number of proof gallons that you find in a barrel of highwines in your experience? A. Oh, at them times the packages would be, I suppose, forty—there would be barrels that wouldn't run over forty, including the over-proof. Proof gallons you are speaking of?

Q. Yes, sir; I am. A. Because the package might have four gallons out, or something like that, three gallons, or two gallons. It would fill the Board of Trade rules if they had sixty gallons in, or if they didn't have over forty in it would comply with the Board of Trade rules. In fact, there has been a suit over a lot—

Mr. EDSALL: Oh, no, we object to this general talk.

230 Judge BARNUM: I do not want it. Stop right there. Please answer questions. Mr. Ames, you have not denied under oath, and are not now denying under oath, that you signed this paper that this suit is upon here. Will you state why you do not deny, or you have not denied, that you signed this paper?

Mr. EDSALL: That is immaterial, your Honor.

The COURT: The objection is sustained.

Judge BARNUM: I propose to elicit from the answer of the witness, that the reason was that he did not know whether he signed it or not, and is unwilling to swear that he did not. To the best of his recollection he would say he did not. I offer to prove that, among other things, as showing his good faith in making this defense, and as tending to repel bad faith, and as a part of his case. Does the court rule it out?

The COURT: Certainly.

(Exception by defendant.)

Q. How long before the judgment was entered upon which the execution was issued and levied upon your goods on the 19th of July, how long before that was that judgment note given? A. Well, I cannot state positively, but I presume a month before. But I suppose the records will show. I should say at least a month before, and may be longer. It may have been dated the 1st of May, and if it was not, it may have been renewed.

Q. Was it the custom among men engaged in your business to give and take judgment notes on these transactions?

Mr. EDSALL: It seems to me it is hardly worth while to go into that.

231 Judge BARNUM: It is to repel any fraud in this matter.

The COURT: Let him answer. Save your point.

(Exception by plaintiffs.)

A. I gave—my judgment notes were out—

Q. (Former question read)? A. Of course I can't say positive what others done, but I know what I done. I done it.

Q. Had you been meeting all your notes? A. Yes, sir, never a note had gone by.

Q. You would as leave give a judgment note as any other? A. I always told them I would as leave give a judgment note as any other.

Q. And you always met them? A. I always met them, and I always got mine.

Q. This particular judgment note was given to Barnes, or no matter who it was. What was it given for? Was it for buying out your partners' interest?

Mr. EDSALL: That is leading, it seems to me.

Judge BARNUM: Well, a fact is a fact. I offer to show this judgment note was given by him to purchase his partners' interest in the business and property, and to repel any bad faith there might be about it.

The COURT: I think they have a right to show all the circum-

stances connected with the suspension of the business, and what was done. They have a right to show the note was given sometime prior.

Judge BARNUM: Well, you can state what your recollection
232 about it is? A. It was given for the purchase money when I bought out my partner. The concern was originally Miller, Ames & Co.

Q. And you got value received for it at the time, did you, in property? A. Yes, sir; it didn't prove to be much value when the sheriff sold it, though.

Q. When did you buy him out? A. I cannot say, but I think it was the 1st of May.

Q. Previous to that? A. Previous.

Judge BARNUM: Did you have any negotiations with President Haddock, of the National Bank of Commerce, during the pendency of that replevin suit, with reference to what you should do, or should not do in that suit?

Mr. EDSALL: Your Honor, I do not see how that can be competent.

The COURT: Do you object to it?

Mr. EDSALL: I do object to it.

The COURT: The objection is sustained.

Judge BARNUM: I offer to show by the witness that at the request of Mr. Haddock, the president of that bank, for the bank, which bank was claiming a lien on these highwines represented by bills of lading and drawn against by these drafts, that it was agreed and settled between Mr. Haddock for the bank, and Mr. Ames, the defendant, here, that the bank would not call Ames in the case, and that Ames should pay the bank $2,500, and that Ames accordingly did pay the bank $2.500. and the bank did agree through Mr. Haddock, the president, to release him from all claims relating to the property in controversy, or the proceeds there-
233 of, and said they wouldn't need him or require him in the suit, and requested him not to come, and that Ames paid the $2,500. (Objected to by plaintiffs; objection sustained by the court, and exception by defendant.)

Judge BARNUM: Coupled with that offer one feature I neglected. That is to say that this $2,500 which was so offered and so paid under that compromise to the bank, was furnished by Barnes, who endorsed for Ames. Barnes was the same man who got this certified check.

The COURT: Was he a member of this firm of Moir & Co.?

Mr. EDSALL: No, sir.

Judge BARNUM: Oh, no.

Mr. EDSALL: He was off down in Akron, Ohio.

Judge BARNUM: That goes with my previous offer. The object of my addendum to this offer is to show where he could get the $2,500 to make the payment. It came from Barnes.

Mr. EDSALL: We object to it with the rest. It goes out with the rest.

The COURT: Yes, sir; the objection is sustained.

(Exception by defendant.)

Cross-Examination by Mr. Edsall.

Q. As I understood you, Mr. Ames, on the morning of July 19th you took the two drafts referred to by the witnesses and the bills of lading of the Michigan Central Railroad Company for these
234 100 barrels of highwines, two bills of lading and two drafts, to the National Bank of Commerce, you or your book-keeper? A. Yes, sir.

Q. And had them there discounted and the proceeds placed to your credit? A. Yes.

Q. Then what did you next do after that? A. Well, I don't know. I don't know that it was me that took them to the bank, so I can't tell.

Q. Well, after they were taken to the bank? A. Oh, after they were taken to the bank?

Q. Yes, what did you next do? A. I cannot say what was next done after they were taken to the bank.

Q. Well, what is the next thing you recall about that transaction. What is the next thing you remember? A. Well, about that transaction about the drafts.

Q. On that day, and in connection with your place of business there, what do you remember next after those drafts being discounted on the credit of the bills of lading for these highwines? A. Well, I don't know what you refer to, General.

Q. I want you to tell what you next did, or remember you did after that?

Judge BARNUM: You mean about this business?

Mr. EDSALL: You can tell what I refer to. You are the man to remember, not me.

235 Judge BARNUM: You mean about this business, General?

Mr. EDSALL: Of course, about this business, his business at his store there on River street? A. Do you mean my own transactions?

Q. I want to know what you yourself next did? A. I cannot tell you what I done the next thing.

Q. What is the next that you did, that you remember you did? A. From what point? From my standing in the bank do you mean?

Q. From the time you had those drafts attached to the bills of lading discounted there in the bank that morning of July 19th? A. Well, I cannot tell you what I done. I know I gave a check that day, but some time after that.

Q. Where did you draw that check? A. I drew it in the office; in my office.

Q. How soon after that discount did you draw that check? A. Well, after the drafts were discounted?

Q. Yes, sir? A. Probably not a great while. It was drawn immediately after I heard the sheriff was in possession.

Q. The check was not drawn then until after you heard the sheriff was in possession? A. That is my recollection, but still it is a good while ago, and I cannot remember just what hour and minute that check was drawn.

Q. Whom did you say you drew that check in favor of? A. Barnes, is my recollection.

Q. Do you say you cannot remember now that that check was drawn after the sheriff was in possession? A. I say I think it was drawn after the sheriff was in possession.

Q. Didn't you testify yesterday that Barnes was there insist-
236 ing he must have something because the sheriff was in possession? A. I don't know. I think I did.

Q. And therefore you drew the check in his favor? A. I do not deny that I did. I do not remember exactly, but I didn't say that I did not do it.

Q. Didn't you testify yesterday on your direct examination that you did? A. Drew it after the sheriff was in possession?

Q. Yes, sir? A. Yes, sir, that is my recollection.

Q. Then say so? A. I say so, now.

Q. Don't try to wiggle out of it. A. I am not trying to wiggle out.

Q. Then it is true, according to your recollection, that the check for $6,000 drawn in favor of Barnes on the National Bank of Commerce, was drawn after you knew the sheriff was in possession, and that your stock and all you had there at the store was levied on under the execution? A. Yes, sir, I do believe so.

Q. And that execution you knew was for a very large amount? A. Yes, sir.

Q. It was a very large judgment? A. Yes, sir, I suppose it was.

Q. Tell us what you mean by a very large amount. If you

cannot give the exact amount, state as near as you can? A.
237 I think that judgment was a round $7,000, but still I could not state. It might have been a good deal more than that.

Q. It might have been a good deal more than that? A. But I don't recollect. It is a good while ago, seventeen years.

Q. And the sheriff was there in possession under that execution, and because he was in possession you drew this check? A. Yes, sir.

Q. What wines, (and who had delivered them), remained in your store on that morning of July 19th, after the Moir wines thus delivered by Lynch & Company and Conklin for Moir, had been shipped away? A. I cannot tell you. There was a lot of wines in there. Some were shipped away.

Q. How many barrels of wine were in there? A. Well, I presume 100 barrels or more. I think 100 barrels or more.

Q. Is it not true that you had a quantity of wines there which Wallace had sold you and delivered just about the same time? A. That might have been the case, but I do not remember.

Q. Can you swear you did not? A. No, I wouldn't swear I did not, because I do not remember.

Q. Don't you know that Wallace replevied the wines and got them and kept them, that he delivered there? A. I don't know it of my own knowledge. After I went out—

Q. Didn't you understand it at the time? A. After I went out of the store and the sheriff went in, when I found the sheriff was in, I went in there and drew the check. I remember drawing the check, and took my overcoat and went out. I didn't go
238 back to the store again for a month. What was done with the wines on the replevin, I don't know.

Q. It is true, then, after that morning when you found the sheriff was there, you did not go back to the store for a month? A. No, I didn't go back for some time.

Q. Where did you go to? A. I staid around town. I went to my attorney's office.

Q. You were not doing business any more? A. No, sir.

Q. You had no place of business? A. Not for a while, no.

Q. Your place of business was closed up and in the sheriff's hands? A. Yes, sir.

Q. Where did you go after that? A. After what?

Q. After this "about a month" that you were around in your attorney's office? A. I don't know how long I was around there.

Q. Well, after that time? You said you were about a month around there. A. I went looking for work.

Q. Where? A. Around the city.

Q. How long did you follow up that business? A. I think I got a situation about six months after. This was July. It was January that I got a situation.

Q. You staid in the city six months looking for work?
239 Where did you go after that six months? A. I did not say I staid in the city.

Q. Where did you look for work? A. I looked for work in the city, but I did not say I staid in the city all the time, because I didn't.

Q. Did you look for work in the city when you were somewhere else? A. No, sir; I looked for work in the city when I was in the city.

Q. How much of that six months were you in the city? A. I cannot recollect, General.

Q. Where were you when you were not in the city? A. I was sometimes one place, and sometimes another.

Q. Tell what place you were at, and how long you were at it, during that six months? A. My wife was sick in Massachusetts, and I was there part of the time.

Q. You were not in a very good place for anybody to find you to make demand for their pay—for Phillips & Carmichael or Robert Moir & Co. to find you to make demand for the payment of those wines, were you?

(Objected to by defendant; objection sustained; exception by plaintiffs.)

Q. After this six months, where did you go? A. I saw Phillips & Carmichael during that time several times.

Q. I am not asking you that question. Don't be so fresh, so ready to give these answers. A. I thought I was answering your question.

240 Where were you af er that six months? A. After that six months?

Q. Yes, sir. A. You go to the hotel registers and you will find out.

Q. I do not want to do that. A. I started traveling for Dickinson, Leach & Co.

Q. You were not in the city? A. I was in the city about one week in four.

Q. Did Chicago continue to be your residence, if you had any? A. After that?

Q. Yes, sir. A. After commencing when?

Q. After that six months? I am not going to keep you on that six months any longer now. After that six months where was your residence? A. For how long?

Q. Any time you are a mind to name. A. The next day?

Q. Yes, sir, or the next year? A. The next year, in Chicago.

Q. You remained a resident of Chicago then for eighteen months after July 19, 1870, did you? That is, for six months and a year? That is just eighteen months, is it not? A. I don't know when I left here—

Q. Oh, I have given the date. You have given an account of yourself for six months after July 19, 1870. You have told me you remained a resident of Chicago a year after that. You said that. Is that what you mean? A. I was on the road for
241 Dickinson, Leach & Co., and I made it my home; yes, sir, my office. Their office was here and I came in and reported once a month for more than a year after that.

Q. Chicago had been your residence before that and you had not got any other? A. Yes, sir; Chicago had been my residence, and I had not done anything different from that except to go out and come back again.

Q. You hadn't any other home? A. No, sir.

Q. Your residence, if you had any, was Chicago, and you were just traveling for a year after the six months, and that takes up eighteen months; next after the first eighteen months after July 19, 1870, where was your residence for the next year, we will say? A. I traveled right along up to about 1875 or 6, I can't tell.

Q. Where was your residence from the end of this eighteen months I have asked you about, after July 19, 1870, up to the end of that five years while you were traveling? A. A petition in bankruptcy was filed against me in York State in 1872. I think it was, in which they claimed that was my residence. I supposed they did. I supposed they had to. I supposed it was in 1872 that the petition in bankruptcy was filed against me there.

Q. Where did you reside in New York? A. What say?

Q. Did you reside in New York in 1872? A. I supposed
242 they called it that I did or else they wouldn't have—

Q. Well, did you?

Judge BARNUM: One moment, your Honor. We have pleaded discharge in bankruptcy, and that discharge in bankruptcy is set out literally in the pleadings, and we shall offer it in evidence in a few minutes, or now—I don't care when. Now, it is a settled question that a record of a court of competent jurisdiction is an adjudication that cannot be disputed. That adjudication fixes the fact of his residence; that it was there, just as letters of administration when produced prove a man's death.

The COURT: They have a right to prove his whereabouts generally.

Judge BARNUM: I wish to state my objection and then take the ruling.

The COURT: They have a right to know where he has been.

Judge BARNUM: Of course, they can follow him to Van Diemen's land.

The COURT: When they offer the adjudication we will see about that.

Judge BARNUM: I object now to their undertaking to show this witness' opinion as to what constitutes a residence when he details the facts, and I object, on the additional ground that the adjudication in bankruptcy pleaded, and to be offered in this case, fixes conclusively that he was a resident there, just as letters of administration, when offered in evidence, show a man is dead, or the probate of a will proves a man is dead.

The COURT: The objection is not well taken. They have a right to know where he has been and what he has been doing, all about it.

243 (Objection overruled, and exception by defendant.)

Mr. EDSALL: Did you reside in New York in the year 1872. If so, state where you resided, what part? A. In 1872, if that is the time; that was the time I was there—well, I don't know what you call constitutes a residing place.

Q. You lived there? A. My family staid there. My wife boarded there I never kept house. She boarded there with my brother at Saratoga, and I suppose I slept there and ate more meals of victuals there in a year, than I did at any other one place.

Q. How many years did that continue? A. Well, I couldn't answer that.

Q. Well, you tell us as near as you can? A. It is impossible, General.

Q. Oh, as nearly as you can? A. I was on the road for Dickinson, Leach & Co.

Q. Well, how many years were you on the road for Dickinson, Leach & Co.? A. Up to 1875, I believe it was.

Q. Then you had no residence here in Chicago while you were residing down there, had you? A. Why, if I resided down there, I couldn't have a residence here. Not that I know of.

Q. Well, you were not here very much, were you? Your family was not here at all? A. My family wasn't here at all. When do you mean?

Q. Oh, during that period, that five years? A. Oh, yes, I think my family was here.

244 Q. Where were they living during that five years that you said they were boarding in New York while you were working for Leach & Co.? A. Where was my family living?

Q. Yes, sir? A. They were boarding.

Q. Where? A. Sometimes in Chester, Massachusetts, with my wife's folks, and sometimes at Saratoga, with my brother, and the balance of the time they would be here.

Q. How much of the time would they be here? A. She went backwards and forwards. She is obliged to go backwards and forwards—oh, just those years I cannot tell, but some of those years her health was very poor.

Q. Were you more in New York than in Chicago? A. Myself individually?

Q. Yes, sir? A. During what period?

Q. During this period you have spoken of; during the period we are now talking about. Don't skip that.

Judge BARNUM: I object to the interjections. Let counsel confine himself to questions.

A. I was in Chicago during those five years more than I was in New York.

Q. How did you happen to eat more meals in Saratoga than you did here, more than any other place if you were here more than at Saratoga? A. I don't know that I said I did. Dur-
245 ing that year, 1872, perhaps I did, but not during the five years.

Q. During the year 1872 you ate more meals in Saratoga than you did in Chicago? A. I suppose perhaps I did. I can't tell.

Q. Did you put the word "perhaps" in before? A. I don't know whether I did. I thought I did. The record will tell.

Q. Then you hadn't any very certain residence, any way, during that period, had you? A. What period do you mean?

Q. During this period of five years after July, 1870. You were traveling about from place to place, sometimes one place and sometimes another, pretty near all the time? A. Myself individually?

Q. Yes, sir? A. Certainly I was. I was on the road constantly.

Q. You were not keeping house anywhere? A. I wasn't keeping house; no, sir.

Q. Your family, your wife, would board at this place or that, just as it suited her convenience during that period? A. Yes, sir; a good portion of that time she did. There was a good portion of the time she staid principally at Saratoga.

Q. You had no fixed residence any place during those years? A. During 1872 she staid principally in Saratoga, and I presume I staid there more than anywhere else.

Q. Now, you said something about there being 100 barrels of

highwines there in your store at the time after the sheriff made the levy, after these Lynch and Conklin wines, delivered on account of Moir, were shipped away. Were there any highwines there
246 that Edward S. Lawrence had delivered on a contract to sell to you? A. I do not say that there was not, nor I wouldn't say there was.

Q. Have you got any further answer to that question? A. I say that there was a lot of wines there, but I cannot tell whom they came from.

Q. Had you paid for those wines that were there? A. I could not tell you that, General.

Q. Don't you know you hadn't? A. I don't know, General.

Q. Do you swear you don't know that you had not paid for those wines? A. For any of them?

Q. For the Lawrence wines and Wallace wines? A. I did not say the Lawrence wines were delivered, or anybody else's.

Q. If they were there, and they amounted to 100 barrels and more, whose else wines were there besides those? That is, wines you had purchased from anybody else besides Wallace and Lawrence? A. I cannot tell. I had contracts that were delivered every day along.

Q. Were you so flush with money at that time that you would pay for 100 barrels of highwines and not know it, and have them in the store there paid for and not know it? A. I have told you I cannot remember whether they were paid for or not. I do not say they were paid for, and I do not know they were not.

247 Q. Didn't you know at the time that Wallace brought the replevin suit, and recovered and got the wines that he had delivered, because they were not paid for; and that Lawrence brought another replevin suit and recovered and got the wines that he had delivered, because they were not paid for? Don't you know that fact? A. I don't dispute but what it was so, but it is so long ago that I can't remember just exactly.

Q. Will you swear there were any wines in your store besides just those delivered by Wallace and Lawrence, and which were not replevied because they were not paid for? A. I wouldn't swear there was any wines besides theirs, and I wouldn't swear theirs were there, because I cannot tell.

Q. When you say there were wines there, you wouldn't swear there was a barrel of wine there that was paid for, would you? A. Of highwines?

Q. Of highwines? A. There was plenty of barrels of whisky there that I had paid for.

Q. I am talking of highwines. You wouldn't swear there was

a barrel of highwines there that you had paid for; and whatever was there may have been those Wallace and Lawrence highwines which you had not paid for? A. I don't know; they might and might not.

Q. You wouldn't swear that they did not recover the wines on a replevin writ? A. No, sir, I won't swear to that.

Q. Now, you said that on the morning of July 19th your store was closed up under an execution writ upon the judgment
248 rendered on a judgment note that you had given to your former partner in business? A. I think that is it, yes, sir.

Q. And that you were closed out under that judgment, sold out under that judgment, whatever you had? A. That would be the result if the sheriff took possession.

Q. Your former partner was the man who had you sold out. He was the man that owned the judgment? A. I think he was the one that owned the judgment note.

Q. Who was this Barnes, of Akron, Ohio, to whom you have referred. Any relation to you? A. No, sir.

Q. He is the man that had endorsed for you? A. Yes, sir.

Q. And had paid the paper that he had endorsed? A. Yes, sir.

Q. And had paid the paper that he had endorsed? A. Yes, sir.

Q. It was your paper that he paid, that he had endorsed, your paper that you were liable on? A. It was my $5,000 note, if I remember, that he had endorsed.

Q. Then it is not quite true that you never failed to pay your debts previous to that? A. How is that?

Q. You had failed to pay that $5,000 note, hadn't you, and so your endorser had to pay it prior to July 18th, 1870? A. He paid it by agreement, because my father years before had endorsed
249 for him, and let him have money when he started in business.

Q. Where is Barnes? Where does he reside? A. In Ohio.

Q. What place? A. I don't know. I think Illyria.

Q. What place did he then reside? A. Akron.

Q. You think he now resides in Illyria? A. Yes, sir.

Q. What is his first name? A. Frank.

Q. Frank Barnes? A. Yes, sir.

Q. Is that his entire first name, Frank? I want to know his first name? A. It may be Franklin, General.

Q. You call him Frank for short? A. Yes, sir.

Re-direct Examination by Judge Barnum.

Q. Mr. Ames, before this crisis of your affairs, when your property was levied upon and sold on execution, had you been keeping house in Chicago, or had you been boarding with your family?

Mr. EDSALL: I have not gone into the history of that. I took him up from that time subsequent.

Judge BARNUM: I want to show his wife was an invalid and
250 he was boarding at the hotel here, and has kept on from that time since.

The COURT: Let him answer.

A. We never had kept house here. We had boarded. My wife left the boarding-house in January before this, and went East and was taken sick there, and was sick at that time.

Judge BARNUM: Just answer my question and then stop, please. You never kept house in Chicago in your life, did you? A. Up to that time?

Q. Yes, sir. A. No, sir.

Q. And until how long after that time was it that you ever kept house in Chicago? A. Oh, within two years. About two years now, I think.

Q. You mean within the last two years? A. Yes, sir.

Q. You have only kept house within the last two years anywhere? A. I am not keeping house here now, but I did commence housekeeping about two years ago.

Q. Among the other things that you did down in New York there, did you vote there? A. I voted there in 1872, I think.

Q. Was that before the bankruptcy proceedings that you voted there? A. Yes, sir.

Q. How much whisky did you have? You said you had whisky in your establishment at the time of the seizure. How much?
251 (Objected to by plaintiffs. Objection overruled, and exception by plaintiffs.)

A. I cannot state, but I should say as much as fifty barrels—still there might have been more and might have been less.

Q. Was this execution debt for which the levy was made, collected out of this stuff that was there? A. It was collected from the whisky and everything that was there, including copper work that cost originally—

Q. And do you know as a matter of personal knowledge, whether they had to sell it all in order to make that debt, or only a part of it? Do you know about that? A. Well, it is so long ago.

Q. Say yes or no. A. I think they sold it all. I know that that they sold it all.

Q. But to satisfy that one execution, I mean? A. Well, I don't know what the money ever came to. Yes, sir, I know it went on that execution. I don't know what was ever done with the money. I never got it in any way.

Q. This you are stating from knowledge? A. Yes. The property did not sell for twenty-five per cent. of its cost.

Q. This Mr. Barnes that you have spoken of, had there been any practice between you and him of endorsing for one another for years?

Mr. EDSALL: We do not think that is material at all, one way or the other.

The COURT: Let him answer.

A. Yes, it was.

252 BENJAMIN W. KENDALL, having been first duly sworn on the part of the defendant herein, was examined in chief by Mr. Reid, and testified as follows:

Q. State your name and residence, please, and place of business? A. Benjamin W. Kendall. Do you want my present residence?

Q. Yes, sir. A. 3146 Calumet avenue.

Q. And business? A. I am secretary of the Phœnix Distilling Company.

Q. Where did you reside during the summer of 1870, including the months of June and July? In what city? A. In Chicago.

Q. In what business were you then engaged, if any? A. When was this?

Q. In June and July, 1870? A. I was keeping books for Mr. Ames.

Q. Where was his place of business? A. 13 and 15, I think it was, River street.

Q. What were your hours of business along during the months of July, 1870, up to and including the 18th of that month? A. What do you mean, the time I got there in the morning?

Q. In the morning, and the time you left, and how constantly you staid there during the day? A. I got there between seven and eight o'clock, and staid as a general thing until six o'clock. Sometimes later. I staid until I got my work done.

Q. Do you remember where you were on the 18th day of July, 1870; what you were doing? A. Well, I don't know as I
253 know where I was, but I presume I was at work.

Q. Do you remember any highwines being delivered there at that place of business by Conklin & Brothers, and Lynch? A. Well, I don't remember those brands, if that is what you mean.

Q. Do you remember of any wines being delivered there to fill a contract, or on account of Moir, by Phillips & Carmichael? A. I don't know anything about any contract with Moir. Phillips & Carmichael, I remember that, yes, sir.

Q. You remember that? A. I remember Phillips & Carmichael, yes, sir.

Q. Do you remember whether you were there that day when the highwines were being delivered by Phillips & Carmichael? A. Well, I think I was. To the best of my knowledge I was.

Q. I will state to you to refresh your recollection, it was the day before the sheriff took possession. A. Well, I was there that day, I am very sure.

Q. All day? A. Well, I don't know anything to the contrary, but what I was there all day.

Q. Did you see the wines come in there? A. I saw wines being delivered there, yes, sir. I don't know which lot was delivered, you understand, or anything of that kind, but wines were coming in and going out there all the time.

Q. Now, please state if you can, and can remember, how it was just along a few days previous to that time, as to whether wines were being received almost daily from some parties or other?

254 Mr. EDSALL: I object, your Honor. I do not see any materiality in that.

The COURT: What is the object?

Judge BARNUM: I want to show wines were being shipped every day, received and shipped and drawn against every day, and this was not an unusual transaction, but what happened almost every day.

Mr. EDSALL: The wines were received and shipped out between the 18th and 19th, on one day or the other, or both, and after the sheriff closed them out the check was drawn for the proceeds of these wines and paid to another man.

Judge BARNUM: We will argue that when we get to that. But the question is whether we can show that a day or two before we were doing business.

(Question read.)

A. I think they were receiving goods there every day.

Mr. REID: What was done with those goods that were being received? A. Run some of them off, as I remember. We would sell some and ship some, and so on. We were doing a general business.

Q. When you shipped some what did you do? Draw drafts on them? A. Why, most assuredly.

Q. How soon after receiving goods into your place did you ship them out and draw drafts against them?

(Objected to by plaintiffs as immaterial.)

The COURT: Do you remember anything about this transaction? A. Well, in a general way.

Q. Have you a recollection of any transaction now that occurred in 1870 or 1871? A. What do you mean, to get it down to a fine point?

255 Q. Do you remember anything that occurred there eighteen years ago? A. Eighteen years ago is a good while to remember.

Q. Well, do you remember anything about it? A. I remember how we did business in a general way.

Q. Well, go ahead; let us see. A. It is fair to presume I might make a mistake in remembering eighteen years back, but as near as I can, I will state it.

Q. Do you remember what you did up to the time the sheriff took possession of the place of business on the 19th of July? Where you were? A. I was at the store in the morning.

Q. And at the usual time?

Mr. EDSALL: Wait a moment. The question is leading.

Mr. REID: Well, at what time? A. Well, the usual time. I cannot say just what time. I was in the habit of being there between seven and eight, sometimes seven o'clock in the morning, and sometimes it would be eight.

Q. Do you remember who else was there, if any one? A. Well, the boys were there, the boys in the store.

Q. Do you remember whether Mr. Ames was there or not? A. I don't know whether he was there when I got there.

Q. Do you remember whether he was there in the morning? A. He was there in the forenoon, yes, sir.

Q. What did you do, do you remember, yourself, that forenoon, personally? A. What did I do?

Q. What did you do about the business that morning? A.

256 Did my regular routine work.

Q. What was your routine work, is what I am getting at? A. Why, my work was in the office, and of course it was making bills and making my drafts, of course, to correspond with the bills, and making up my bank account and all such things, as a general office business would require.

Q. Do you remember whether you made up the bank account and prepared the bills and drafts that morning, or not? A. What?

Q. Do you remember whether you prepared the bank account as usual that morning, and made up the drafts? A. I prepared it every morning.

Q. Did you draw the drafts, prepare the drafts? A. Make the drafts do you mean?

Q. Yes, sir. A. Yes, sir, as a general thing I made out the drafts, unless I was sick or something of that kind.

Q. Did you see Phillips or Carmichael there either day, the 18th or 19th, I refer to? A. Well, I should say that I saw them there the 18th. That is, I make the date the 18th because you say the 19th was the day he was closed up. I do not pretend to remember the dates any way, only to take that as a guide.

Q. Was the usual force of employes there that day? A. Why, certainly, we were doing business as usual.

Q. Now, was there anything unusual in your course of business on the 18th day of July, if you remember, or not? A. I don't
257 know what you would call unusual.

Mr. EDSALL: That is objected to.

Mr. REID: Anything to attract your attention? Anything out of the usual course? A. Well, you will have to define that a little; I don't know; nothing that looked unusual to me.

Q. Did anybody that day demand payment for these wines of you, or in your presence of anybody? A. When was that?

Q. On the 18th? A. Not that I remember.

Q. On the 19th?

Mr. EDSALL: He don't say he saw anybody there.

A. No, I was trying to think, I don't think there was anybody; I don't think I saw anybody that day.

Mr. REID: On the 19th, did anybody ask you for payment for these wines?

A. No, I say I don't think I saw anybody.

Q. Or in your presence ask payment of any one. Did any one come there and make demands for payment for these wines, either of you or anybody else? A. No.

Q. Do you remember the sheriff taking possession of Ames' place of business? A. I wasn't there the time he came.

Q. How soon after did you learn of it? And where was you when you learned of it? A. Well, I learned of it sometime in the afternoon.

258 Q. Were you surprised, or had you any intimation that the sheriff would take possession of your place? A. Why, no; I knew nothing about it, of course.

Q. Had anything transpired in and about that business and the conduct of Mr. Ames, or the way the business was conducted previous to that time, that would lead you to suppose or believe that any arrangement was being made to have the sheriff come and levy upon the goods?

Mr. EDSALL: We object to that as immaterial.

The COURT: Let him answer.

A. Why, I heard nothing of the kind, and I suspected nothing of the kind.

Mr. REID: Then it was a matter of surprise, it took you by surprise?

(Objected to by plaintiff, and question withdrawn.)

Cross-Examination by Mr. Edsall.

Q. What is your present business, Mr. Kendall? A. I am the secretary of the Phœnix Distilling Company.

Q. And Mr. Ames is the treasurer of that company? A. Is the treasurer; yes, sir.

Q. You and he are in that way connected in business now? A. Yes, sir.

Q. How long have you been connected in that way in business? A. Well, I should say, perhaps—I would like to have you ask me —I would like to understand your "business."

Q. How long have you been secretary and Mr. Ames treasurer of the Phœnix Distilling Company? You understand that?

259 A. Yes, sir, exactly. Well, I should say, four or five years.

Q. What business were you carrying on for four or five years next before the four or five years you just mentioned? A. I was with the Phœnix Distilling Company, but not an officer.

Q. Then you have been employed in the Phœnix Distilling Company how many years? A. I think, since 1876.

Q. 1876. When did that company start business? A. That is the time, I think it was 1876, now, I am not positive.

Q. You have been with that company, then, since its beginning? A. Since it was organized.

Q. Has Mr. Ames been with that company since its beginning in 1876? A. Yes, sir.

Q. Then, in that way, you and Mr. Ames have had these business associations together in some relation to this same company? A. Certainly.

Q. Were you a stockholder in that Phœnix Distilling Company? Are you now? A. Yes, sir.

Q. When did your interest as a stockholder commence? A. When they commenced.

Q. When? When they commenced? A. When the company commenced.

Q. And Ames was also a stockholder, and his interest commenced at the same time? A. Yes, sir.

Q. Now, what were you doing for the five years next before 1876? A. I was with Dickinson & Leach, and Dickinson & Abel.

260 Q. And Ames was traveling for the same company that you were working for, was he not? A. Yes, sir.

Q. So you have been in company for a good while? A. We have been a good while.

Q. Then in June and July, 1876, you were Ames' book-keeper? A. How is that?

Q. In June and July in 1876, you were Mr. Ames' book-keeper? A. 1876?

Q. In 1870, take out 1876 and put in 1870. A. 1870, yes, sir.

Q. You stated that Ames at his place of business for a few days prior to the 18th of July, 1870, had been receiving highwines from day to day? A. Well, I state that in this way, that we were doing business from time to time, and of course we were running highwines; so it is fair to presume we were that day.

Q. Do you remember of his receiving more or less during those days than he had been in the habit of receiving? A. More or less?

Q. Yes, sir. Generally before that? A. Well, I should say not, but then we may have had some goods pushed on to us.

Q. On the morning of July 19, you state that you were at the place of business there? A. Yes, sir, in the forenoon.

Q. During the entire forenoon? A. No, I should say not, I do not remember.

261 Q. You were not there when the levy was made, you say? A. No, I do not remember exactly what time I went away from there, but I should say somewhere between ten and eleven o'clock.

Q. You were not there when the levy was made? A. I wasn't there when the levy was made.

Q. You do not know anything about that? A. No, sir.

Q. How long before the levy was made did you leave? A. Well, that I do not remember.

Q. Can you swear to the hour you left? A. No, I could not swear exactly.

Q. You cannot swear to the hour you left? A. I could not remember. I did not put it down to an hour or minute.

Q. You do not swear that you saw Phillips and Carmichael there the morning of the 19th? A. No, sir, I don't think they were there.

Q. If they were there, do you think you wouldn't see them? A. If they were there I should think I would see them.

Q. But they were not there because you didn't see them? (Objected to by defendant.)

Q. Now about this judgment. You said you hadn't any suspicion that the store would be levied on. Did you know anything about Ames having given a judgment note that might be entered

up and levy made at any time? A. Well, I don't think I remember anything about a judgment note.

Q. You d.dn't know of the making of a judgment note that might be entered up and execution levied any day? A. No, sir, I never understood anything of that kind.

262 Q. So when you say you didn't have any suspicion that there might be a levy and closing up there, you didn't know the existence of a large judgment note outstanding against him? A. Well, I don't remember such a thing now.

Q. Well, if you had known it, you would have known the possibility of its being entered up, and the place closed up, wouldn't you? You knew enough about business to know that? A. I know judgment notes are dangerous.

Q. You know when you put it in the hands of the other fellow he can come down at any time on you; you know that?

(Objected to by defendant.)

Q. If you had known it, you would have had a little suspicion of what might occur?

(Objected to by defendant.)

A. Well, I don't know what would have occurred; a man might hold such a thing as that a good while.

Q. Well, you might have had a suspicion?

BYRON L. SAWYER, having been first duly sworn on the part of the defendant herein, was examined in chief by Mr. Reid, and testified as follows:

Q. Please state your name and place of residence? A. Byron L. Sawyer, Chicago.

Q. Where did you reside in the summer of 1870, including the months of June and July, up to the 18th of that month? A. In this city.

Q. In what business were you engaged at that time? A.

263 I was connected with a distilling company.

Q. What company was that? A. The Northwestern Distilling Company.

Q. What kind of a company was that as to capacity; was it called a large dealer, or small? A. It was a large-sized house.

Q. Do you remember whether or not that company had a large amount of highwines on hand that belonged to them, during the months of June and previous to the 18th day of July, about that time? A. I remember their carrying a large stock of highwines.

Q. Where did they carry them? A. Some in this city and some elsewhere.

Q. Where did they carry the majority of them? A. Well, there was more in this city than any other one city.

Q. Well, where did they have a large quantity, any other place?
A. New York and Boston, Philadelphia and Baltimore.
Q. How many barrels did they have in New York at that time?
A. Well, I cannot say.
Q. Well, what is your best recollection of it?
Mr. EDSALL: I don't see the materiality of this.
The COURT: What is the object?
Mr. REID: The object of this is to show that other persons engaged in the same line of business, were carrying their goods in the eastern markets.
Mr. EDSALL: We do not question that.
Mr. REID: If you do not question, then it is admitted.

* * * * *

Mr. BARNUM: We now offer in evidence copy of a duly au-
265 thenticated copy of a decree of the United States court for New York State. The discharge of Wilson Ames in bankruptcy from all his obligations.
Mr. EDSALL: The paper seems to be properly certified to and I think it is competent evidence.
The same was admitted in evidence and is as follows:

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To all to whom these Presents shall come, Greeting: Know ye, that among the records and proceedings of the District Court of the United States, for the Northern District of New York, in the office of the clerk of said court, at Buffalo, in said district, there remains therein of record a decree for discharge in bankruptcy of Wilson Ames in the words and figures following, to wit:

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

In Bankruptcy, No. 3,405.

266 In the matter of }
Wilson Ames, a Bankrupt. }

At Buffalo, in said district, this 13th day of September, 1872.
This case having heretofore, to wit: on the 23d day of August, 1872, come on to be heard upon the petition and application of the said bankrupt for a discharge from all his debts, and upon the order heretofore made thereon, that all creditors who have proved their debts, and all persons in interest, might appear on the day last

mentioned, at 10 o'clock in the forenoon, and show cause, if any they had, why the prayer of said petition should not be granted; and it now appearing that notice of such has been given as required by law and the practice of the court; and that the said bankrupt has in all things conformed to his duty under the act of the Congress of the United States, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 2867, and is entitled, under the provisions thereof, to receive a discharge. It is hereby ordered, adjudged and decreed, that this court do grant and it hereby does adjudge, decree and grant to the said Wilson Ames, the said bankrupt, a discharge from all his debts except as in said act provided.

And it is further ordered, adjudged and decreed that a certificate of such discharge under the seal of this court (attested by the clerk thereof) in the words and figures following, namely:

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

In Bankruptcy, No. 3,405.

267 In the matter of
Wilson Ames, a Bankrupt.

Whereas Wilson Ames, of Saratoga Springs, in the County of Saratoga and State of New York, has been duly adjudged a bankrupt under the Act of Congress, establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said Wilson Ames be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 28th day of March, 1872, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at Buffalo, in the said district, this 13th day of September, A. D. 1872.

[L. S.] N. K. HALL, *Judge.*

Attest: M. P. FILLMORE, *Clerk.*

be immediately signed by the judge of this court, and given to the said bankrupt.

And thereupon the certificate of the discharge of the said bankrupt under the seal of this court attested as aforesaid, and in the

words and figures aforesaid, was duly signed by the said judge, and given to the said bankrupt on the day and year in the caption of this order and decree above mentioned.

In testimony whereof, and of the proceedings in this matter, on the same day and year, and at the place mentioned in the caption hereof, the record thereof is duly signed by the clerk of the
268 said court.

M. P. FILLMORE, *Clerk.*

All which we have caused by these presents to be exemplified, and the seal of said court to be hereunto affixed.

Witness, the Hon. Alfred C. Coxe, judge of said court at Buffalo, in said district, this 20th day of February, A. D. 1886.

[SEAL.] CHARLES B. GERMAIN, *Clerk.*

NORTHERN DISTRICT OF NEW YORK. } ss.

I, Alfred C. Coxe, Judge of the District court of the United States for the Northern District of New York, do hereby certify that the foregoing exemplification of a decree for the discharge of Wilson Ames, a bankrupt, as duly authenticated according to law, that I am well acquainted with the handwriting of Charles B. Germain, clerk of said court, that I believe the signature of Charles B. Germain signed to said exemplification, is in his proper handwriting, and is his genuine signature; that he is the clerk of said court, that said United States District court is a court of record, that the seal affixed to said exemplification of record, is the seal of the said United States District court, and that the foregoing attestation of said clerk is in due form.

In witness whereof, I have hereunto subscribed my name at Utica in said district, this 22d day of February, 1886.

ALFRED C. COXE,

District Judge of the United States for the Northern District
269 *of New York, and Judge of the District Court for said District.*

The defendant next offered in evidence a duly certified copy from the Supreme court of Illinois, of a record of a suit pending in that court on an appeal from the Circuit court of Cook county, in a case brought in the latter court by the plaintiff in the present suit, Robert Moir, John C. Nicol and James Peterson, doing business under the firm name of Robert Moir & Co., plaintiffs, against Will-

iam N. Phillips, Thomas S. Phillips and George S. Carmichael, partners under the firm name of Phillips & Carmichael, the same being a suit in assumpsit upon the common counts, with a bill of particulars attached to the declaration, and reads as follows:

Mr. EDSALL: We object to the reading of it.

* * * * *

278 Judge BARNUM: Is it admissible in evidence?

The COURT: I think not; so that it brings us right back to the question, the point which I stated some time ago, hoping to shorten the argument a little. In my judgment there is but one question in the case for this court and jury to consider, and that question is this; was this defendant guilty of fraud in disposing of that property? That is, such fraud as would not relieve him notwithstanding his discharge in bankruptcy?

Judge BARNUM: We must except to the remarks of the court.

The COURT: That, in my judgment is all there is in this case.

Judge BARNUM: We must except to all the remarks of the court as they have been stated, as to the fact, and also to the remark that there is but one thing to be tried in this case. If there is anything of that kind to be given to the jury, it should be

279 given in writing in the shape of instructions to the jury at the end of the case.

The COURT: It is not to instruct the jury. It is to instruct you about the case, to try and shorten it.

Judge BARNUM: I did not ask for any instructions.

The COURT: I have thought that, from the beginning, and I do not change my mind now, I repeat it, I shall hold you down, as far as possible, allowing you to get in evidence by way of offers of evidence of all these collateral proceedings.

Judge BARNUM: We are glad your Honor allows us to make the offers.

The COURT: But I think this case must finally be determined upon the question to be decided by the jury, whether or not the defendant was guilty of a fraud in disposing of this property in the way he did, to such an extent, and upon the question of fraud, of course, I mean active fraud.

Judge BARNUM: Actual fraud.

The COURT: Actual fraud, not legal fraud, because a man may be guilty of legal fraud and still be discharged in bankruptcy. The bankrupt law contemplates actual fraud. I think that is the question which in this case must finally determine it, and I think it is the only question in this case. Now, you may proceed with that in view, you have held a different opinion from the court all the way through.

Judge BARNUM: That is my misfortune; but there have been two or three reversals in these proceedings.

The COURT: Now, you may offer evidence to get it in the
280 record, but I will not admit it.

Judge BARNUM: Of course, I am very much obliged for the privilege. The offer is excluded, I understand, and exception by defendant. Your Honor stated before the adjournment that you would admit the testimony of Carmichael & Phillips in the suit between Moir & Co. and Carmichael & Phillips.

The COURT: If it was germain to the issue here.

Judge BARNUM: Yes, sir, so far as material to the issue here. I have taken an abstract of the evidence in that case as furnished me by Gen. Edsall as the abstract in that case, and I have marked the passages with the letter B, and lines in the margin which I think the court will find to be absolutely material to the merits of this controversy, and therefore admissible under what the court stated. There are seven or eight of those passages, and they are not very long. I will hand it up to the court.

The COURT: You can hand it to counsel and he can examine it and hand it in to-morrow morning.

Mr. EDSALL: I would prefer that.

Judge BARNUM: The abstract is admitted to be the abstract in that case as furnished me at my request, and it is admitted that this abstract which is here, and was furnished me by Gen. Edsall——

Mr. EDSALL: It is the abstract in the case it purports to be, I do not raise any question now.

Judge BARNUM: And it is a correct abstract of the testimony as given, and the passages will be offered in detail in the morning.

Mr. EDSALL: I shall claim the right if any of it goes in, to offer anything that is pertinent.

Judge BARNUM: There is but little more that we have to
281 offer. I do not know as we have anything more.

Mr. EDSALL: Is this the paper marked Exhibit "A"?

Judge BARNUM: Yes, sir. Now, the court has not ruled on whether this certified copy of the proceedings and the judgment in the Moir case against Phillips & Carmichael should be admitted. The General asked me if I would admit it was reversed, and I said yes.

The COURT: You can put in anything you agree to.

Judge BARNUM: Your Honor has treated the matter as in, because you have gone on and decided the judgment was rendered and reversed.

The COURT: I was referring to the Supreme court decisions.

Judge BARNUM: Are you willing it should go in?

Mr. EDSALL: No, but if you want it to go in the record, the best way is to state what it is.

Judge BARNUM: I do. It is Exhibit A.

Mr. EDSALL: I object to its going in, but when they make up the record of what is offered you better copy this paper. I do object to it.

The COURT: Objection sustained.

Judge BARNUM: But the General consents that when we make up the bill of exceptions this paper may go in, or a copy of it, instead of what I say. There is nothing else except the passages in this abstract.

Mr. EDSALL: Then you offer nothing more?

Judge BARNUM: I know of nothing more.

Judge BARNUM: I will offer in evidence certain portions of testimony of George S. Carmichael, one of the defendants in a former suit. I will offer certain portions marked on the margin with
282 the letter "B" in this pamphlet I will now read from. It is an abstract of record from the Supreme Court of Illinois, Northern Grand Division, September term, A. D. 1873. Thomas S. Phillips *et al.*, appellants, *vs.* Robert Moir *et al.*, appellees, containing the testimony of George Carmichael & Thomas S. Phillips, in the case of Robert Moir & Co. *vs.* Phillips and Carmichael, tried in the Circuit court of Cook county, in A. D. 1872.

By Mr. EDSALL: I will state to the court, I have no objection to that, and I have marked the letter "E", opposite the portions of the testimony I desired to read.

Judge BARNUM reading from said printed abstract):

The witness Carmichael testified, "that he had been a member of the firm of Phillips & Carmichael since 1860 or 1861, and had known plaintiffs since that time; in 1870, the early part of the year, Mr. Moir came to the defendant's office and told them that there was a special tax of one per cent. on highwines by government which had to be paid, if sold to a commission house, and that the tax could be saved if we sold direct to the distiller, to be delivered at the distillery. He said the distilleries in Chicago and the vicinity have that advantage of that one per cent. because they could make their sales direct and save it. He wanted to know whether we could not arrange in some way so that they could save that one per cent.? I told Mr. Moir that I would inquire into it, and I did so. I consulted with several distillers and brokers on 'Change, as to the manner of making sales and saving the one per cent. I reported to Mr. Moir the result of my inquiries; that if he would be-
come a member of the Board on 'Change, and make sales in his
283 own name as distiller, to be delivered at the distillery, adding freight to Chicago, that he could save the one per cent.; but in order to become a member of the board, he would have to have an

office in Chicago. I told him he could say his office was in ours, if he wanted to, and I would introduce his name to the board of directors for membership. I introduced him in that way, as having a desk in our office, and he was admitted as a member.

"The arrangement for the transaction of business then, was that the defendants were to transact it as his agents, or in his name, and not as commission men; the transaction was to be kept by our clerk as his clerk for that transaction, and to be rendered in that way, and not to render a more regular account of sales as commission men, but merely as brokers or agents—doing everything in his name; the sales to be made at the distillery, adding freight to Chicago. After that arrangement was made, his name was put up on our door, and on our desk in the office, notifying the public that that was his office."

Mr. EDSALL: (On the part of the plaintiffs), (reading from testimony of same witness in the same abstract):

"I don't think he ever did much business there, and whatever few sales were made on this arrangement, our book-keeper made out statements and rendered to him the amount sold, and the amount collected, not on account of sales, but merely as statements of amounts."

Judge BARNUM: (Reading from testimony of same witness in same abstract):

"In June, 1870, Mr. Moir came to me one day on 'Change 284 and told me that he had made a sale through a broker of 200 barrels of wines—buyer's option for the month of July succeeding; that he had to pay brokerage on that sale, and he wanted to know what we would charge him for putting up the margins for him and attending to the delivery.

I replied to him that we would not make any charge; that he could pay us what he thought was right; he did not apply to me to make such contracts before making a sale; I asked him who the broker was; and he said Henry Wallace; that the sale was made to Ames.

I think we met together on 'Change then, Mr. Wallace, Mr. Ames, Mr. Moir and myself; Mr. Moir told Mr. Ames that if he was not here when he should call for the wines, to call on us for them on the option, and he requested us to put up the margin.

Afterwards and after wines had declined more than three cents a gallon, we called on Ames for additional margins, and he declined to put up any, stating that by the terms of the sale, he was only liable to the extent of $300. We reported that fact to Mr. Moir.

Mr. Moir said that if he bought the wines, he wanted us to buy them so that it would make one delivery, and deliver direct from

the person from whom we bought, to Ames, on the contract, and not have them deliver to us, and then from us to Ames, making two deliveries.

Mr. Moir was then on his way East, and witness did not see him again until after the transaction with Ames.

Mr. Moir never gave us any such instructions as not to deliver the wines until we had the money.

285 Mr. Thomas S. Phillips was present at this last conversation with Mr. Moir.

On 'Change when the contract was made, Mr. Moir introduced me to Ames.

I was not acquainted with Ames personally. We had never had any transactions with him, he introduced me as the man to whom he had sold the wines.

I only knew him from public report as a business man in good standing; never knew anything prejudicial to his character in regard to his solvency until those wines had been shipped by him.

The purchase of the wines from Conklin and Lynch was made between 12 and 1 o'clock on the Board of Trade.

Ames' store was on River street, in Chicago. Conklin's wines were at the Rock Island depot; Lynch's were in his distillery on the North side, near the Chicago avenue bridge, about one mile from Ames' store. The Rock Island depot is more than a mile from Ames' store.

Witness had been engaged as a member of the Board of Trade in the business of commission merchant, and in selling and delivering highwines for about twelve years, during that time had handled a great many wines.

There is a general usage and custom in the city of Chicago, in regard to delivering wines, and the sale and collection of the pay, as to the time in which it shall be done. The custom is to deliver wines before you collect for them. The wines have to be sent to the person's place of business by drays or teams. After they are all delivered there, the seller directs them to be inspected, if

286 they are required to be inspected; sometimes they are and sometimes they are not. If the purchaser requires them to be inspected, then the seller notifies the inspector, and he inspects them on the premises of the purchaser.

It is generally agreed upon between the purchaser and the seller, who is to inspect them; he returns his inspection certificate to the seller; from this certificate the bill of sale is made out; then it is presented to the purchaser for payment.

At the time of this transaction, according to the custom and usage, it was necessary also to procure the government coupons

and deliver them to the purchaser before payment could be collected.

According to this custom and usage payment was always made by checks, not in currency or money-checks uncertified; the check was never certified unless the purchaser got it certified after he received it.

If the sale was made during 'Change hours, and the delivery made the same afternoon, it is customary to present the bill on the succeeding morning, and it generally takes all the afternoon to deliver wines to the place of purchase.

If the delivery is made in the morning, it is usual to collect before banking hours close—3 o'clock in the afternoon; banking hours in Chicago are from 10 to 3. It was a month or two after these transactions, before plaintiffs had any idea but what Mr. Moir was perfectly satisfied with the whole transaction in the matter. Directly after it occurred, and before Mr. Moir returned from the east, his partner came up from Oquawka.

We notified him of the facts, and he came right up here,
287 and we told him all the circumstances, and he told us to go on and prosecute those suits and do the best we could for them; this was Mr. Peterson, and it occurred within two or three days after the replevin suits were commenced, and before Mr. Moir returned from New York. We notified the firm of the failure of Ames, and of his getting the wines without paying; the same day it occurred, by letter.

Mr. Moir paid us 50 cents a barrel brokerage, for whatever wines we sold and collected for. This sale, arranged through Wallace, is the only sale I know of Mr. Moir making Ames.

This 50 cents a barrel was intended to include brokerage and clerk hire, and office rent. It was so expressed, so as not to be considered commission, the object was by Mr. Moir, to save the one per cent. distillery tax, or still tax.

Mr. Wallace was to draw the contract with Ames and he did draw it; we were to put up the margins and attend to the delivery.

Mr. Moir directed us to sign the contract on his behalf and attend to drawing it. Mr. Wallace sent us two contracts; we signed for Mr. Moir. They were sent to Ames to sign, one of each was kept by him. Mr. Wallace wrote all the contracts except the signatures. Mr. Moir came to me the same day on 'Change, and stated that he had made this sale through Mr. Wallace, and stated that he had to pay brokerage on the sale, and asked us what we would charge to put up the margin and make the delivery of the wines for him? I replied to him that we would attend to that business, and would not make any charge.

Mr. Moir first requested us to attend to the delivery. When he made the sale, he came to me and stated that he made the sale
288 through a broker. He said that he had to pay brokerage, and he wanted to know what we would charge him to attend to the delivery. That was the conversation at that time. Afterwards he came up and introduced Ames; said we were to act for him in his absence, in case he was not here, he was to call on us for the wines. At first Ames and Wallace were not present—afterwards they came up, don't think he gave us any further instructions to attend to putting up margin and delivering, if called for.

I know the universal custom in regard to the payment of wines to be that they are paid for in checks—bank checks. It is likewise customary that these checks are never certified; have never known them to be certified. This delivery to Ames was not made until after bank hours."

Mr. EDSALL: I will now read from said abstract on behalf of the plaintiffs, by consent, a portion of George S. Carmichael's testimony, taken in the case of Robert Moir *et al.* against Thomas S. Phillips *et al.*, immediately after the first part read by Judge Barnum, the sentence concluded:

"Notifying the public that this was his office." I will now read from Carmichael's testimony the following: "I don't think he ever did much business there, and whatever few sales were made on this arrangement, our bookkeeper made out statements and rendered to him the amount sold and the amount collected, not on account of sales, but merely statements of amounts."

Immediately after the sentence, "And he requested us to put up margins," subsequently the contract with Ames was re-
289 duced to writing. Wallace drew up the contract and sent it to our office. There were duplicates; one was sent to Wilson Ames. There were two contracts, each for 100 barrels. The following is a copy of one of the contracts:

"OFFICE OF MILLER, AMES & COMPANY,

"Successors to Edwards & Crosby, and Edwards & Company, distillers of alcohol, spirits and whiskies, No. 13 and 15 River street.

CHICAGO, June 9, 1876.

(Contract.)

I have this day bought of Robert Moir & Company one hundred barrels ot highwines 'Iron bound' at one dollar and seven cents per proof gallon. The conditions of the sale are as follows: The buyer can call from the first of July to the 20th of the same month by giving three days' notice, and if not called for by the 20th of July the seller has the privilege of delivering up to the end of

July, by giving three days' notice. To be delivered in fifty barrel lots. To insure the fulfillment of this contract, a margin of $300 will be put up by both parties.

5c. Int. Rev. Stamp. Cancelled.

(Signed) WILSON AMES.

* * * * *

After the contract had been prepared and sent to us by Wallace, we sent it to Ames' office, and he signed and returned it; we also sent one to him to keep. We then called on him for the margin,
and he sent us $300, requesting us to hold it and not to deliver
290 it to the treasurer of the Board of Trade as usual. Mr. Moir
put up $300 as margins in our hands."

Then comes the paragraph read by Judge Barnum concluding with the words:

"He reported that fact to Mr. Moir." The next after that occurs the following, which we read:

"Sometime after that Mr. Moir came to our office, and stated that the warehouse in which the wines were stored from which he expected to make had been burned, and in case Ames should call for these wines before they could manufacture more, and have them here to deliver. that he wished us to go into the market and buy the wines and deliver on these contracts. That was about the first of July; I can't state the day certain. It was some time before any call was made."

Then follows a paragraph read by Judge Barnum and ending with the sentence, "the Rock Island depot is more than a mile from Ames store." The next after that we will read the following:

"The next morning about 9 o'clock, I went to Ames' store; Mr. Phillips went with me; I went there at his request; I inquired for Ames; there was no one in the office, but a man was sitting just outside of the office. I inquired of him, and he said Ames had not been there. I inquired of him where the book-keeper was, and he said the book-keeper had gone a fishing. I inquired of him if there was any one in charge, and he said there was no one but a laboring man—a porter back in the store; we went back in the store and asked him where Ames was, and he said he did not know. I asked him where Ames was living, and he said he did not know,
but his family had recently gone east and he was boarding at
291 some hotel. I—him where the book-keeper had gone and he
said he had gone a-fishing.

"I asked him if there was any one in charge of the store, and he said no one but himself. I asked him where the wines were that we had delivered the afternoon previous?

He said he did not know. I asked him if they had been shipping any wines? He said they had been shipping some the night previous and some that morning by the Michigan Central Railroad. We then jumped into a buggy and drove over to the Michigan Central Railroad. There we found fifty barrels of these wines in a car adjoining the depot, and the other fifty had been loaded that morning and gone on the early freight train, consigned to New York, the fifty barrels in the car was the Conklin lot.

We then drove to Mr. Goudy's office and stated the facts to him, and asked his advice in the matter, and he advised us to commence an action of replevin—but I omitted to say that after we had been to the depot, we drove back to the store again and there found the sheriff in possession of the store by virtue of an execution against Ames; we then got out a replevin writ and replevined the fifty barrels that were in the car, and sent them to H. H. Shufelt's store, a rectifier, and sold them to him for the market price.

I think we got possession of these fifty barrels before 12 o'clock, I know it was before 1 o'clock. That afternoon Mr. Phillips took the train for Detroit for the purpose of securing the other fifty barrels. The fifty barrels were shipped back from Detroit and sold to Shufelt at ninety-seven cents, a cent less than we paid for them.

The money received from Shufelt we have since paid to the
292 National Bank of Commerce—the bank that discounted Ames'
draft, and had the bills of lading. We paid $6,000 and more, have paid out more than we received from Shufelt.

The reason why it was paid to the Bank of Commerce, was that said bank claimed it had title to the wines, and the Supreme court sustained their title. The bank defended the replevin suits, and we paid the money under the judgment rendered in those cases.

We first heard of the claim of the bank to the wines some days after we commenced the replevin suits; when we captured the wines we supposed that we had saved Mr. Moir."

Then followed a paragraph read by Judge Barnum. We will commence after the paragraph ending with the words: "We notified the firm of the failure of Ames, and of his getting the wines without pay, the same day it occurred, by letter."

Then we read as follows:

"The drafts for the purchase of the wines from Conklin and Lynch were drawn by the defendants on the plaintiffs, and presented to the Union National Bank, which paid defendants the money, and sent the drafts forward to the plaintiffs for collection.

The defendants were not doing Mr. Moir's business as commission men. The transactions were not to appear upon their commission books, but whatever collections were to be made for him, were to be kept merely as memoranda by the defendant's clerk.

Defendant did not render him accounts of sales as they had done previously, but rendered statements of sales and collections."

Then follows the paragraph read by Judge Barnum, and after the paragraph ending with the words, "I replied to him that
293 we would attend to that business and would not make any charge, that he could pay us what he thought was right."

I will read the following: "We expected to deliver the wines; we told Ames to call on us in case he were not here. I speak now of the call, not of the delivery. If Mr. Moir had been here, Ames would have called on him for the wines under the contract. There is a distinction between calling for wines and delivering them. I am speaking of calling for wines under the buyer's option."

Then follows the paragraph read by Judge Barnum, which Mr. Edsall read, as follows: "Don't think he ever gave us any further instructions than to attend to the putting up the margin and delivering if called for.

Mr. Moir replied to that that we must be careful in making the delivery; I told him we should handle his wines as well as we would our own, and do as well for him as we would for ourselves.

After Mr. Moir's distillery had been destroyed, Mr. Moir came to Chicago, to our office, and stated the fact that the wines that he intended to deliver on this sale had been burned up, and if Ames should call on us for the wines under the option before they manufactured more and could ship them to Chicago, he requested us to go into the market and buy the wines and deliver them to Ames, and at the same time directed us to buy them so as to make one delivery; not to buy them and have them delivered and sold to Ames, but to have them delivered direct from the parties from whom we purchased to Ames, so as to have one delivery. He said nothing about the quantities in which they were to be delivered. Did not state a word of the kind that we were to deliver
294 in fifty barrel lots; we were to deliver according to the call of Ames under the contract. If he called for the whole hundred or the two hundred, we were to purchase them and deliver them; or if he called for fifty we were to purchase that and deliver it; he called for 100.

"Mr. Moir had no connection with the deposit of the money received from Shufelt in the Union National Bank, neither as to the deposit or payment of the interest.

"We offered to pay this money to Mr. Moir provided he would step in our place as plaintiffs in those suits; he refused to do it; didn't give any reason for such refusal; he declined to take any responsibility in the matter. He did not tell me the wines were delivered contrary to his instructions, without getting the money.

We have paid the two judgments which were obtained against us—one in the Superior court, and one at Detroit. We have paid the money on those two judgments to the Bank of Commerce. The claim of the Bank of Commerce on these wines was about $6,000, cannot give the exact amount in dollars and cents. The bank claimed that it had taken bills of lading from Ames and had advanced money on the bills, and claimed that the title to the property passed to them.

"I understand that it was required that every party who sold wines had to furnish a coupon from the distillery direct, or from the seller. I understand the office of this coupon is to identify the wines, so that the government may trace the wines to enable them to ascertain whether the taxes have been paid."

Then follows a paragraph read by Judge Barnum. After the words "this delivery to Ames was not made until after bank hours," we will read as follows:

"My partner, Mr. Phillips, went to Ames' office that same after-
295 noon twice, between 4 and 5 and 5 and 6 o'clock, for the purpose of attending to the delivery and collection, if Ames had been there.

"But he was not there at the time; he did not see him. He went for the purpose of collecting the money, and particularly to see that the wines were delivered by those parties; he went there particularly to see that the delivery was made, it being 'buyers option' unless the delivery was made that afternoon, Mr. Moir would be liable to lose his margins and the difference in price on that day and the price at which he sold them—nine cents. He went there to see that the delivery was surely made, and if Ames had been there at that time he would have got a check, or tried to get a check from him."

"We wrote that we had purchased wines on the 18th—50 barrels each of Conklin & Lynch—that we had given orders to deliver on this contract to Ames. We stated to him that we saw the wines delivered that afternoon to Ames' store; that we were there attending to the delivery; that Ames was not there; that we left the wines at the store until the next morning; that we went there next morning for the purpose of collection for the wines, that neither Ames nor his book-keeper was there, that we ascertained that they had shipped the wines; that we went to the railroad depot and found fifty barrels and ascertained that the other fifty barrels had gone out on the freight train that morning; that we then ascertained that the sheriff had taken possession of the establishment; that we then consulted with Mr. Goudy as to what was best to be done in the matter, and Mr. Goudy instructed us to commence these

296 suits and that we had commenced the suits. Can't remember anything more, but it was the transactions of those two days that were contained in the letter.

Mr. Moir was in New York at that time. I am not certain whether we wrote him a letter to New York, or not; I think not, I think we informed him first when he returned. His partner came up, and I think I telegraphed to Mr. Moir at New York, and Mr. Moir in a few days came to Chicago, and I explained then to him the circumstances; don't remember that he stated to Mr. Moir on his return from New York that I (witness) had drawn this $6,000, or any other amount on the Union Bank; he knew that they had bought the wines for him, but as to drawing the drafts, I am not certain; didn't see him afterwards for several weeks; I was out of the city during that time; there was some correspondence between our house and Mr. Moir while I was absent. Didn't learn of his dissatisfaction in regard to the matter, until I returned to the city some five or six weeks after the occurrence. This I learned from him or from the correspondence, probably the latter.

"I left the city about the first of August, and was absent about three weeks.

"It was Mr. Peterson who came up from Oquawka before Mr. Moir returned from New York. He went over the whole case; told him what we had done in the matter. Don't think he said in so many words 'to go on and prosecute the suits, but he hoped that we would be able to maintain the suits, and save the money,—language to that effect; I cannot give the language. I think we paid Lynch for the wines, purchased of him three thousand three hundred and twenty-two dollars ($3,322) and some cents. I
297 think from a memorandum made by our book-keeper; I know it is about that amount. I won't swear to the dollar or a hundred dollars; I think that that was about the amount. It is my belief we paid him within fifty dollars of that amount, but I could not swear to it certain. We paid him a check on the Union National Bank, I think it was on the Union National Bank, Mr. Phillips drew the check. If not on that bank, I should think it was on the Fifth National Bank, because we kept an account in each bank. I think we paid Conklin for the fifty barrels bought of him three thousand one hundred and fifty-four dollars ($3,154) and some cents.

"In the suits where judgments were rendered on which we paid the money received from Shufelt, the Bank of Commerce came and defended the suits, one of the suits was in Superior court by our firm, for fifty barrels of wine, against the Michigan Central Railroad Company, and the other suit was commenced by our firm against the Michigan Central Railroad Company in Detroit.

"The bank set up in that suit that they were the pledgees of the property; the bank claimed that it had advanced money on the bills of lading on the morning of the 19th of July, 1870, after the wines were left at Ames store. The defendant offered in evidence the bills of lading in connection with the testimony of the witness, copies of which are given in the record, one bill is dated July 19, 1870, and acknowledged the receipt from Wilson Ames of fifty barrels of highwines consigned to A. S. Miller & Co, New York; another bill bears date July 19, 1870, and acknowledges the receipt from Wilson Ames of fifty barrels of highwines consigned to A. S. Miller and Company, New York, and both of them issued by
298 the Michigan Central Railroad Company. The defendants had never sold any property for the plaintiffs previous to this transaction for which they failed to get their pay."

Mr. EDSALL: A. S. Miller & Company should read W. S. Miller & Company.

Mr. EDSALL: I will now read from the testimony in said case of Thomas S. Phillips, contained in the same printed abstracts, thus (reading): "That he was one of the defendants in this suit (*Robert Moir et al.* v. *Thomas S. Phillips et al.* tried in the Superior court of this county, in 1872). That he met Mr. Moir in Chicago, as he was going east in July, and had a conversation with him in regard to the sale of the wines that were to be delivered to Ames; this was either on 'Change or in the defendant's office—thought it was on 'Change.

Mr. Moir spoke about the delivery of the wines that he had sold to Ames, and in the conversation I intimated to Mr. Moir in case it was necessary to buy them in and deliver them, that there was some little risk in delivering wines; that he did not know Ames at all— Never had a transaction with him, and his reply to him (witness) was that we must be as careful as possible; that was about the sum and substance of the conversation had at that time."

Judge BARNUM (Reading from testimony of same witness): "The information received was favorable; never heard prior to the 19th of July anything affecting the credit or standing of Ames.

Mr. EDSALL (Reading from testimony of same witness): "On the 18th of July I saw wines being delivered at Ames' place."

"When the wines were called for by Mr. Ames on the 15th of
299 July, 1870, which made them deliverable on Monday, July 18th, we wrote to Moir & Company, and requested them to let us know whether they would ship the wines to fill the sale, as Mr. Moir mentioned they might ship, or whether we should buy in and deliver them; and we got a dispatch back to buy them and deliver them. We received that dispatch, I think, on Saturday. That

was the last direction we had in regard to the purchase and delivery of those wines.

I went to Ames' store on the afternoon of the 18th of July, for the purpose of making a tender of these wines to Ames on Moir's contract, for Moir. I went there, and Ames was not there nor his book-keeper. The wines were being delivered by Conklin and Lynch, and also the Northwestern company's teams were delivering wines there. I waited there half or three-quarters of an hour, when Ames did not come.

The man in charge said he thought he would be there—he had gone away somewhere, and I left and went away to the North side of the river and got my horse and buggy, and I drove back to Ames' place and he was not there, and this man in charge said he had not been there. I waited there some little time. The wines were about the last of them delivered when I left there, somewhere near 6 o'clock, and I remarked to the man in charge that I would leave them there in his charge. I told him what I had come for, to deliver the wines upon the Moir sale, and I would be there as soon as I come down in the morning, and I left."

"The first time I called was about 4 o'clock—a little after, between 4 and 5— and the wines we bought from Lynch and Conklin were being delivered while I was there.

"They were being placed at the back part of the store. 300 The person I saw there seemed to be a porter in charge, taking care of them—rolling them away and keeping each lot by itself.

"I went there the next morning a little after breakfast—after 8 o'clock, I should think. I inquired for Ames and he was not there; I inquired for the book-keeper and he wasn't there. I asked where he was, and he said he had gone fishing—that is, the book-keeper. I inquired where Ames was; he said he didn't know. I then began to look into the back part of the store, and found all the Lynch and Conklin wines gone. I asked the man in charge, and he said they had been shipping some wines from there.

"I immediately got into the buggy and drove up to our office. I told Mr. Carmichael there was something wrong. I used the expression there was 'a nigger in the fence' about those wines.

"I got Mr. Carmichael and we went back to Mr. Ames' place. We then ascertained that there had been some wines taken from there the night after I left—"

(Objected to.)

"and early that morning, at the depot. We went immediately over to the Michigan Central depot and made inquiries, and we found the Conklin lot of wines in a car; the Lynch wines had gone

off. I went to Conklin's place and got his book-keeper and he came down and identified the wines.

Mr. Carmichael and I went to Mr. Goudy's office from there, and, at his suggestion, immediately got out replevin suits and took the Conklin wines out of the depot. The sheriff delivered them to me, and I put them on drays and sent them to Shufelt. They were sold to him.

"I took the first train in the afternoon for Detroit, replevined those wines there and shipped them back. These were also
301 sent to Shufelt and sold to him.

"We paid for those wines to Lynch and Conklin by draft upon Moir & Company, and gave them checks on the Union National Bank for their respective bills. I gave them the checks in the bank.

"We went to the bank and made the draft—drew the draft there, and gave the checks; Mr. Conklin and Mr. Lynch were present in the bank. I took their bills and added them together and made a draft for the amount; the draft did not include anything else except the bills of Conklin and Lynch. It was intended simply to cover those bills. I can't recollect the amount of the draft; our papers were all burned.

"We received the money from Shufelt for the wines that we sold to him; that money was put on special deposit in the Union National Bank, and remained there for about two years.

"The money has been paid on judgments obtained, and we have paid out on the judgments and expenses, six thousand six hundred and thirty-six eighty-seven one hundredths dollars ($6,636.87)."

Judge BARNUM (reading from testimony of same witness): "I made inquiries as to the standing of Ames, took all the necessary precautions, made these inquiries on the 18th of July, 1870, of Henry Wallace, Benjamin Merrill and E. F. Lawrence, persons that I knew were acquainted with Ames. Made these inquiries because I knew nothing about the standing of Ames; wanted to be posted; and, knowing Mr. Moir to be a prudent, particular man, I wanted to serve his interest as best I could.

"The information received was favorable."

Then follows a passage that I read before (continues read-
302 ing): "The same afternoon Mr. Lawrence told me on 'Change, when I asked him this question about Ames' responsibility, that they considered him good, for they were delivering wines to him.

"The money has been paid on judgments obtained, and we have paid out on the judgments and expenses ($6,636.87) six thousand six hundred and thirty-six and 87-100 dollars, and there is still a balance due on the judgments of about five hundred dollars ($500),

which we are able to pay any day, only we want them to get the judgments released here and at Detroit, which they are trying to do.

"The expenses, $636.87, were principally the Detroit expenses, the replevin fees, the lawyers' fees, and my expenses there and back. My individual expenses were seventeen and 55-100 dollars ($17.55) lawyers' retaining fees, and replevin fees in Detroit amounted to two hundred and sixty-one and 50-100 dollars ($261.50), the lawyers' fees in Michigan is taxable costs, five dollars for cartage on the high-wines after they returned here.

"We paid the draft of Mr. Russel, attorney, for seventy-five dollars ($75), and for one hundred and twenty-nine and thirty-two one-hundredths (129\frac{32}{100}$) for sheriff's costs. 'We paid the costs in the Superior court of Chicago, altogether six hundred and sixty four and 37-100 dollars ($664.37), taking out from the $664.37 twenty-seven and 50-100 dollars ($27.50) for gas pipe that did not belong to this transaction, leaves $636.87. This amount did not include any lawyers fees, and expenses in the suit in Chicago.' We prosecuted these two replevin suits, and employed counsel both at Detroit and here.

"After I returned from Detroit, I saw one of the plaintiffs
303 here present in Chicago, within a day or two, had a conversation with him about this matter. I told him the whole transaction through, I claimed (explained) the whole thing to him, both here and at Detroit; I told him what we had done—gave him all the information I had. He said we had done all that we could do. He made the remark he hoped that the wines would be held—he said if they should not be, it would be pretty hard on the firm to lose them.

"No complaint whatever was made. He seemed perfectly satisfied with what we had done.

"He wrote to us (that is, Mr. Moir) to deposit the proceeds of the wines received from Shufelt in the National bank to his credit. We did not do so. I wrote to Mr. Moir that Mr. Carmichael had attended more to that business than I had.

"Our firm did business for Mr. Moir before Mr. Carmichael came into it. In December, 1851.

"Never made any contract with him to guarantee the collection of sale.

"Have been engaged in the commission business in Chicago since 1859—general commission business.

"He (meaning Carmichael) gave Mr. Moir, when he returned from the East, a full statement of the facts; don't remember whether I told him that I had received sixty odd hundred dollars from the Union National Bank on the draft. I know Mr. Moir's partner understood it. Mr. Moir appeared to be perfectly satisfied

with what he had done; he made no objection; I cannot tell all that was said, I only recollect that Mr. Moir was satisfied, and expressed himself as being satisfied with what we had done. I cannot
304 give the language.

"He (the witness Phillips) knew nothing about the solvency or condition of Ames. He had no transactions with him—knew nothing about his solvency. He made inquiries as to Ames' credit and standing, first of Henry Wallace, the day the highwines were bought—the same man that testified here to-day, and he told me that Ames was good, and that he should not hesitate to deliver the wines. But he said, Mr. Merrill knows more about him than I do, he can give you all the information, "I went over from Mr. Wallace's to Mr. Merrill's, and he seemed to know that this hundred barrels of wine was going from Moir to Ames, and I told him that Mr. Moir had goods to buy, and I delivered them, and I wanted to know whether Ames was a safe person too, as he called for them to be delivered at his place of business. Mr. Merrill said he considered him perfectly good; said he would not hesitate one moment in delivering the wine. He also said the Northwestern Distilling Company are selling to him, and there is Mr. Lawrence, he can tell you all about him.

I went from Mr. Merrill to Mr. Lawrence, and asked him the question. He said, we are selling wines, and if he did not think him good he would not sell him wines, and that they were then delivering him wines. That was enough, I thought. He said he thought Ames was good. Don't remember that he said he thought he was a fair risk. He did say they were delivering him wines."

* * * * *

331 The foregoing was all the evidence introduced on the trial of this cause. And thereupon the court gave to the jury on behalf of the plaintiffs, the following instructions, to wit:

PLAINTIFFS' INSTRUCTIONS.

No. 1. The jury are instructed that the proper construction of the contract sued upon and offered and admitted in evidence in this case is, that the sale of the highwines therein mentioned was a sale for cash payment on delivery, and not a sale upon credit. (*Given.*)

No. 2. And if the jury find from the evidence that the highwines in question were delivered by the agents of the plaintiffs, at the store, or place of business of the defendant, and with the intention that the same should be then paid for by Ames in accordance with the terms of the contract, and that there

should be no complete delivery until payment was made, then under such a state of facts, the law grants the plaintiffs a lien upon said highwines as against Ames, the defendant, to secure payment of the purchase price therefor, until Ames paid for the same in accordance with the terms of the contract; and under such circumstances, if you find from the evidence such were the circumstances, Ames would have no lawful right before the wines were paid for, to ship, pledge, or so dispose of said highwines as to defeat such lien of the plaintiffs thereon; and if you find from the evidence that he did so, without payment for the wines, and without the knowledge or consent of plaintiffs, such acts would be competent evidence to be considered by the jury, in connection with all the other evidence, in determining the question whether the defendant was guilty of fraud, or the debt sued for is barred by the discharge
332 in bankruptcy produced in evidence. (*Given.*)

No. 3. If the jury find from the evidence that the defendant Ames entered into a written contract with the plaintiffs for the purchase of 100 barrels of highwines in manner and form as alleged in the declaration, such contract was not a sale of the highwines upon credit, but the plaintiffs would be entitled to be paid the cash therefor, at the contract price at the time the delivery of the wines was completed. (*Given.*)

No. 4. Where property is sold and delivered, not upon credit, but under a contract requiring payment on delivery, as between the parties to such sale, the seller, unless he has made an unconditional delivery or done some act waiving the right, retains a lien upon such property for the contract price until he is paid therefor, in accordance with the contract; and if the buyer, without having paid for such property, immediately after such delivery under the contract, and without the consent or knowledge of the seller or any waiver of his rights, ships, pledges or so disposes of such property as to defeat such lien thereon of the seller, the jury would have the right to find that a debt created by such act was created by the fraud of the buyer; and consequently that such debt would not be barred by a discharge in bankruptcy of the debtor. (*Given.*)

(It is for the jury to say, however, from all the evidence whether the defendant in this case was in fact guilty of actual fraud, in pledging the property in queston without having paid for the same,
333 in the manner shown by the evidence.)

So much of the foregoing instruction No. 4, as inclosed in brackets thus ( ) was added by the court.

No. 7. A discharge in bankruptcy constitutes no defense to a debt created by the actual fraud of the defendant; and if the jury find from the evidence that the debt sued for was created by the

fraud of the defendant in the manner and form as stated in the replications of the plaintiffs to defendant's pleas setting up the discharge in bankruptcy. then such discharge in bankruptcy set up in said pleas, would constitute no defense in this action. (*Given.*)

No. 8. The jury are instructed that under the statutes of this state, money due on an instrument in writing such as that set out in the declaration in this case, draws interest at 6 per cent. per annum from the time the money becomes due until paid; and if the jury find the issues for the plaintiffs, they should allow such interest in this case. (*Given.*)

To the giving of each and all of which instructions the defendant by his counsel, then and there excepted.

And thereupon the court gave to the jury, on behalf of the defendant, the following instructions, to wit:

DEFENDANT'S INSTRUCTIONS.

1. The jury are instructed that the law is, where personal property is, by contract, sold for cash to be paid on delivery, the de-
334 livery and payment are to be concurrent acts, and therefore, if the goods are put into possession of the buyer in expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods, unless some outside third party has for value and without notice of the seller's rights acquired an interest therein or become the owner thereof. (*Given.*)

2. The discharge of Ames in bankruptcy in evidence in this case, is a complete defense to this action, unless the jury believe, from the preponderance of the evidence, the burden of proof being upon the plaintiffs. that the alleged debt sued upon was created by the fraud of the bankrupt. But fraud thus referred to, means positive fraud, or fraud in fact involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. (*Given May 20, 1887.*)

3. The court instructs the jury that the circumstances that the discharge of Ames in bankruptcy was granted by the District court of the United States in the State of New York, does not affect or weaken the effect of said discharge, and Ames is entitled to the benefit thereof, unless the debt sued upon was created by fraud of the bankrupt, as defined in the other instructions given you by the court. (*Given.*)

And the defendant, by his counsel, then and there asked the court to also give to the jury the following instructions, to wit:

4. It is for the jury to decide by the evidence under the cir-
336 cumstances in evidence in this case, whether the sale of the highwines was or was not for cash on delivery, and unless the jury believe, from the evidence, that said sale was for cash on delivery, the defendant, Ames, had the right to pledge or sell and ship said wines without previously paying for the same. (*Refused May 20, 1887.*)

5. The jury are instructed, as a matter of law, that an embarrassed debtor has the legal right honestly to prefer and pay any creditor he pleases, and the mere fact that he does prefer and pay the claim of any particular creditor is, in itself, no fraud or evidence of fraud or evidence of any intent on his part to defraud other creditors. (*Refused. Tends to mislead and is an abstract principle.*)

6. Under the circumstances in evidence in this case, it is for the jury to decide by the evidence as a question of fact whether the writing sued upon was delivered and accepted with the intention on both sides that it should be and become the written contract of the parties. The burden of proving that it was delivered with such intention on both sides rests upon the plaintiffs. And unless the jury believe, from the evidence, that it was both delivered and accepted with such intention on both sides, then the jury must find their verdict for the defendant, Ames. (*Refused May 20, 1887.*)

7. The jury are instructed, as a matter of law, that, even if they believe from the evidence, under the instructions of the court, that the sale of the highwines in question was a sale for cash on delivery, and that the same were pledged and shipped by Ames, although they were not paid for, still such pledging and shipment was
337 not, in itself, such fraud as will deprive the defendant, Ames, of the benefit of his discharge in bankruptcy. (*Refused May 20, 1887. It may be.*)

8. Even if the jury believe from the evidence that Ames had not the right to pledge and ship the highwines in question, the mere fact that he did so pledge and ship the same without right, is not enough to defeat his discharge in bankruptcy. (*Refused May 20, 1887. It may be.*)

9. The jury are instructed that a "simple contract in writing," is an instrument containing upon its face the following essential elements of a contract, viz: consideration, terms, and one by which both parties are bound, and that if it is necessary to revert to the evidence of witnesses to show that it is binding upon either as a contract, that under the rules of law, such a paper is not a simple contract in writing, and is a verbal one, and in this case if the jury find from the evidence that the paper does not contain upon its face all of the above mentioned essentials of a contract, then they must

find for the defendant, this being a suit upon a claimed written contract and no other. (*Refused May 20, 1887.*)

10. If the jury believe from the evidence that the claimed contract was entered into, as far as appears, in good faith, by the defendant Ames, and that said Ames was solvent at the time, and made no false representations to induce the plaintiffs to enter into the claimed contract, then they are instructed that if the de-
338 fendant Ames thereafter became insolvent, he was under no legal obligations to inform the plaintiffs of such fact, and that if he did not practice any artifice, trick or false pretense as a means of obtaining possession of the highwines, his possession thereof was lawful, and his failure to pay for the same was a mere breach of contract, and not such an act of fraud as will prevent his discharge in bankruptcy from being a complete defense to the plaintiffs' action, and in such case they must render a verdict for the defendant. (*Refused May 20, 1887.*)

11. The jury are instructed that if they believe from the evidence that the dealings concerning the highwines in controversy between the plaintiffs and the defendant, including anything that appears in evidence to have been done by any agent of either party, was an ordinary commercial transaction, entered into as far as appears, in good faith, and that the only fraud proved or alleged, or claimed, is such only as may be implied by the violation of the duty resting upon the defendant, if there was any such duty resting upon him, to pay for the highwines before exercising any acts of ownership over them or shipping them away; then they are instructed that this is not such fraud as will defeat the benefit of the defendant's discharge in bankruptcy, and they must find for the defendant. (*Refused May 20, 1887.*)

339 12. The jury are instructed that the plaintiffs, in order to defeat the operation and benefit of the defendant's discharge in bankruptcy, must show to your satisfaction that there was some false representation, or deceit, or some device, or trick, made or practiced by the defendant, to induce the plaintiffs to enter into the alleged contract, or to induce them or their agents, to deliver the highwines to the defendants on or previous to the 18th day of June, 1870. (*Refused May 20, 1887; not bound to prove to the "satisfaction" of the jury, neither is it good law.*)

13. The jury are instructed that the non-payment of a debt, or any fraud used by a debtor after the creation of a debt to evade payment of the same, is not such fraud as will prevent the debtor from recovering (receiving) the benefit of his discharge in bankruptcy, and in this case if the jury believe from the evidence, that the evidence that the defendant Ames, at the time he entered into the writ-

ten alleged contract, to wit: on or about the 9th of June, 1870, did so honestly, and without any intention to defraud the plaintiffs out of the price of the highwines, if they should ever be delivered to him, and that at the same time he did not make any false promises to induce the plaintiff to consent to the alleged contract, if you believe that they did so consent, and that after the execution of this paper, the defendant did not practice any art or device to induce the plaintiffs or their agents to deliver the wines into his possession, then they are instructed that any acts thereafter committed by the defendant to evade payment for the same, if they believe that he did commit any such, do not amount to such fraud as will de-
340 prive the defendant from receiving the benefit of his discharge in bankruptcy, and they must render a verdict for the defendant. (*Refused May 20, 1887.*)

14. The jury are instructed that it is a rule of law, based upon sound reason, that a party cannot occupy inconsistent positions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts.

And if the jury believe from the evidence that the highwines in controversy were sold by the plaintiffs to the defendant for cash, to be paid on delivery, and that they were put into the possession of Ames in expectation that he would, upon the completion of the delivery pay the price therefor, and that he did not do it, then the plaintiffs were at liberty to regard the delivery as conditional, and could at once reclaim the possession by an action of replevin or otherwise, or on the other hand, the plaintiffs could sue Ames for the price of the highwines, but the plaintiffs could not do both.

And if the jury further believe from the evidence that because of the non-payment of the price of the wines, at the time of their delivery, the plaintiff's agents brought replevin suits and by means thereof obtained for the plaintiffs the possession of all of the highwines in controversy, and sold the same for cash to H. H. Shufeldt & Co., and that the plaintiffs claimed said cash proceeds and sued their agents for the same; then the jury are instructed that such action of the plaintiffs, was such an election by them as must
341 defeat this action, and if you find the facts as stated in this instruction, you must find for the defendant. (*Refused May 20, 1887.*)

15. It is for the jury to decide, as a question of fact, from all the evidence in the case, whether the highwines in controversy were delivered to the defendant Ames under and in pursuance of a written contract as claimed by the plaintiffs in their declaration, or whether the same were so delivered under and in pursuance of an unwritten contract made upon the Board of Trade, if you find from

the evidence that such was made between Ames and the plaintiffs' firm by Moir, as a member thereof, through the broker named Wallace; and if the jury believe from the evidence that such unwritten contract was so made as aforesaid, and that the highwines for the price of which this suit is brought, were delivered to Ames under and in pursuance of such unwritten contract, then your verdict in this case should be in favor of the defendant Ames. (*Refused May 20, 1887.*)

16. The jury are instructed that fraud is never to be presumed, but must be affirmatively proved by the party alleging the same. The law presumes that all men are fair and honest; that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay or defraud others; and if any transaction called in question is equally capable of two constructions, one that is fair and honest and the other that is dishonest, there the law is that the transaction questioned is presumed to be honest and fair. (*Refused May 20, 1887.*)

342 17. The plaintiffs in their declaration claim, and in order to recover in this suit, they must prove by a preponderance of the evidence, that the highwines in question were delivered to Ames under and in pursuance of a written contract. The burden of proving such claim rests upon the plaintiffs; and if the jury believe from the evidence that said highwines were delivered to Ames, not in pursuance of a written contract, but in pursuance of any unwritten contract, if any, proved by the evidence in this case, then you must find your verdict for the defendant Ames. (*Refused May 20, 1887. No evidence to support it.*)

18. The court instructs the jury that the writing sued upon in this case is not, and never was a binding contract in writing; that the defendant Ames was not by the terms thereof bound to call for said highwines at all; and that if he did not call for the same, the plaintiffs were not bound to deliver said highwines, but had merely the privilege of delivering the same or not as they chose, and as the plaintiffs in that case were not bound absolutely by the terms of said writing to deliver the highwines, said writing was not obligatory upon them at the time of the making thereof, and therefore was and is not obligatory upon the defendant Ames. (*Refused May 20, 1887.*)

19. The jury are further instructed that in order to recover in this case the burden is upon the plaintiffs, of proving by a preponderance of the evidence that there was a complete and legal
343 delivery of said highwines to the defendant Ames; and that the title to said highwines passed to and vested in said Ames. And if the jury believe from all the facts and circumstances in evidence

in the case, and under the instructions of the court, that such legal delivery was not completed, and that said Ames did not get a valid title to said highwines, then the jury must find for the defendant Ames. (*Refused May 20, 1887. Misleading.*)

20. The jury are instructed as matter of law, that if the sale of the highwines in question was upon terms of cash on delivery, and if you believe from the evidence that possession of said highwines was delivered to Ames upon the expectation on the part of plaintiffs' agents that Ames would pay the cash price on the delivery thereof, then such transfer of possession of the wines to Ames was only a conditional delivery, and in that case the title to the highwines did not pass to or vest in Ames. If you find that defendant, Ames, did not pay such cash price, and that the plaintiffs did not waive payment of the same; and if you find from the evidence the facts to be as stated in this instruction, then the plaintiffs have failed to prove that Ames got any title to the highwines, and have failed also to prove the delivery thereof as charged in the declaration, and your verdict in such case must be for the defendant, Ames. (*Refused May 20, 1887.*)

But the court refused to give these instructions to the jury; to which decision of the court in refusing to give the same, and each of them, to the jury, the defendant, by his counsel, then and there excepted.

344 And thereupon the court of its own motion gave to the jury the following, its own, instructions to wit:

The plaintiffs herein bring this suit to recover from the defendant Ames, the contract price of one hundred barrels of highwines, at one dollar and seven cents per proof gallon.

It is not disputed that the property was actually delivered at the place of business of the defendant on the afternoon of the 18th of July, 1870, and that the defendant has never paid the plaintiffs for the same.

It is insisted, however, by the defendant, that some two years after this transaction, he obtained a discharge in bankruptcy from all of his then existing indebtedness, and he therefore is not liable in this suit.

The plaintiffs do not dispute the discharge, but insist that the defendant in taking possession of the property and disposing of the same in the manner shown by the evidence, was guilty of fraud, and therefore his discharge in bankruptcy does not relieve him from the liability to pay for the property in question; and this is the principal question for you to determine in making up your verdict.

It is not disputed that the defendant immediately or very soon after the goods were transported to his place of business, and before

he had paid for the same, caused the same to be delivered to the railroaad company, obtained bills of lading for the same, drew a draft on New York, and, attaching the bills of lading, procured the National Bank of Commerce to discount the same, and with the proceeds derived therefrom paid a prior indebtedness to another creditor.

345 It further appears from the evidence that the sheriff on the morning of the 19th, the day the draft was drawn, took possession of all the personal property of the defendant at his place of business under an execution against the defendant.

These acts on the part of the defendant, in taking possession and disposing of the property in question without paying for the same, the plaintiffs insist constitutes such an actual fraud on the part of the defendant, as to defeat his discharge in bankruptcy so far as this claim is concerned, and renders him still liable to the plaintiff for the value of the highwines and interest thereon, notwithstanding the discharge, and it is for you, gentlemen of the jury, to determine from these facts, taken in connection with all the other evidence in the case, whether the defendant was actually guilty of fraud or not.

And upon the question of fraud, the court instructs you that fraud, such as will defeat a discharge in bankruptcy and render a party still liable for an indebtedness, notwithstanding the discharge, must be actual fraud, or fraud involving moral turpitude, or bad faith, intentional wrong, on the part of the defendant. (*Given May 20, 1887.*)

To the giving of which last instructions by the court, the defendant, by his counsel, then and there excepted.

The foregoing given instructions, are all of the instructions that were given.

And thereupon the jury rendered a verdict against the defendant; whereupon the defendant by his counsel, then and there moved the court to set aside the verdict so rendered, and grant a new

346 trial of this cause, and filed the following reasons in writing for his motion, to wit:

IN THE SUPERIOR COURT OF COOK COUNTY, OF THE MAY TERM, A. D. 1887.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

Robert Moir, John C. Nichol and James Peterson, late partners as Robert Moir & Co.
vs.
Wilson Ames.

General No. 100,894.
Assumpsit.

Now comes the defendant, by his attorneys aforesaid, and moves the court to set aside the verdict rendered, and to grant a new trial in this cause, and for grounds of his motion, the defendant shows to the court the following, to wit:

1st. The court admitted on the trial, improper evidence on the part of the plaintiffs, and overruled the defendant's objections thereto.

2d. The court refused to admit proper evidence offered by the defendant.

3d. The court erred in giving to the jury the instructions, and each of them, for the plaintiffs.

4th. The court erred in refusing to give to the jury all and each of the instructions as asked for by the defendant.

5th. The court erred in modifying and altering some of the instructions asked for by the defendant, and in giving same to the jury, so modified and altered, as and for instructions for the defendant.

347 6th. The court erred in giving as given, on its own motion, its instruction to the jury.

7th. The verdict is contrary to the law in the case.

8th. The verdict is contrary to the evidence in the case.

9th. The court during the trial, and in the presence and hearing of the jury, made remarks and statements that had a tendency to prejudice the jury against the defendant, and against the merits of his defense.

10th. The court, during the progress of the trial, and in the hearing and presence of the jury, stated orally that in its judgment there was but one question in this case for the court and jury to consider, viz.: was the defendant guilty of fraud in disposing of that property; that is, such fraud as would not relieve him notwithstanding his discharge in bankruptcy; thus virtually taking from the jury all other matters of defense, that were raised and admissible under the issues made by the pleadings.

11th. The court during the trial, and in the presence and hearing of the jury, orally stated that the paper or instrument declared upon in each count of the declaration, was the contract of the parties, and thus virtually took from the consideration of the jury, the question as to whether the same was as matter of fact the contract or a mere memorandum.

12th. The court during the trial, and in the presence and hearing of the jury, when making rulings upon the admissibility of evidence offered, or upon some point of law raised by counsel, in several instances in its comments upon the evidence, virtually made findings of facts, which belonged to the jury to find, and the
348 same had a tendency to mislead the jury, when they came to consider such matters.

13th. The court, in the hearing and presence of the jury, in its remarks upon various matters arising upon the trial, commented upon the testimony and gave its conclusions upon same, and also in some instances, inadvertently misstated parts of the testimony, and stated that one or more material matters which were specified, were conceded, when the same had not been conceded by the defendant.

CHICAGO, Ills., May 25, 1887. By JOHN G. REID and WM. H. BARNUM, *Attys. for Deft.*

But the court after argument denied the motion, to which decision of the court in denying such motion, the defendant, by his counsel, then and there excepted, and then and there moved the court in arrest of judgment, and filed the following reasons in writing for such motion in arrest, to wit:

IN THE SUPERIOR COURT OF COOK COUNTY, OF THE TERM, 1887.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Robert Moir, John C. Nichol and James Peterson, late partners as Robert Moir & Co.,
vs.
Wilson Ames.

Genl. No. 100,894. Motion in arrest of judgment.

349 And now upon the overruling of the motion of the defendant for a new trial in the above entitled cause, to which exceptions has been taken, the said defendant, by his attorneys aforesaid, comes and moves in arrest of judgment, because he says:

1st. The plaintiff's declaration, and each and every count thereof, and the matters therein contained, are insufficient in law to warrant any judgment to be rendered thereon in favor of the plaintiffs.

2d. The paper or instrument, in writing, declared upon in each count of the declaration, is the sole cause of action, and the same, properly construed is, of itself, and in itself, at most, a mere written conditional offer on the part of the defendant Ames to buy highwines, and as such does not constitute a contract, or any cause of action; for, among other things, it lacks mutuality, or consideration to make it a binding obligation upon Ames; and, outside of this paper or writing, there is no allegation in either count of the above, and other essentials necessary to make or support an executory contract, or a cause of action.

JOHN G. REID and
WILLIAM H. BARNUM,
Attys. for Deft.

But the court denied the motion, and gave judgment on the verdict against the defendant; to which decision of the court in denying such motion, and to the rendering of such judgment, the defendant, by his counsel, then and there excepted. And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, pur-
350 suant to the statute in such case made; which is accordingly done this 12th day of July, A. D. 1887.

KIRK HAWES, (SEAL.)
Judge.

* * * * *

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

352 OCTOBER TERM, A. D. 1887.

Wilson Ames,
Appellant,
vs.
Robert Moir, John C. Nicol and James Peterson, partners as Robert Moir & Co.,
Appellees.

Appeal from Superior of Court of Cook County.

Now comes the appellant, by his attorneys, and says that in the record and proceedings aforesaid, there are manifest errors in this, to wit:

1st. The court erred in sustaining the demurrer of the plaintiffs to the 4th, 5th, 8th and 9th pleas of the defendant, and to each of them.

2d. The court erred in admitting on the trial improper evidence on the part of the plaintiffs, and in overruling defendant's objections thereto.

3d. The court erred in refusing to admit proper evidence offered by the defendant.

4th. The court erred in giving to the jury the instructions, and each of them, for the plaintiffs.

5th. The court erred in refusing to give to the jury all, and each of the instructions, as asked for by the defendant.

6th. The court erred in modifying and altering some of the
353 instructions asked for by the defendant, and in giving same to the jury so modified and altered, as and for instructions for the defendant.

7th. The court erred in giving, as given on its own motion, its instructions to the jury.

8th. The verdict is contrary to the law in the case.

9th. The verdict is contrary to the evidence in the case.

10th. The court during the trial and in the presence and hearing of the jury, made remarks and statements that had a tendency to prejudice the jury against the defendant, and against the merits of his defense.

11th. The court during the progress of the trial, and in the hearing and presence of the jury, stated orally that in its judgment there was but one question in this case for the court and jury to consider, viz: was the defendant guilty of fraud in disposing of that property; that is, such fraud as would not relieve him notwithstanding his discharge in bankruptcy; thus virtually taking from the jury all other matters of defense, that were raised and admissible under issues made by the pleadings, and in support of which prior thereto, considerable evidence had been given.

12th. The court during the trial and in the presence and hearing of the jury, orally stated that the paper or instrument declared upon, in each count of the declaration, was the contract of the par-
ties, and thus virtually took from the consideration of the jury,
354 the question as to whether the same was in fact the contract, or a mere memorandum.

13th. The court during the trial, and in the presence and hearing of the jury, when making rulings upon the admissibility of evidence offered, or upon some point of law raised by counsel, virtually made findings of facts which belonged to the jury to find, and the same had a tendency to mislead the jury when they came

to consider such matters, if they considered them at all after hearing such statements and conclusions of the court.

14th. The court during the trial, and in the presence and hearing of the jury, in its remarks upon various matters arising upon the trial, commented upon the testimony, and gave its conclusions upon same, and also in some instances inadvertently misstated parts of the testimony, and stated that one or more material matters which were specified, were conceded, when the same had not been conceded by the defendant; and also, in one or more instances, made use of illustrations that had a tendency to prejudice the jury against the defendant, and against the merits of his defense.

15th. The court erred in overruling the motion of the defendant for a new trial.

16th. The court erred in overruling the motion in arrest of judgment made by the defendant.

17th. The court erred in rendering judgment against the defendant.

For which and many other errors appearing of record, the appellant prays that said judgment may be reversed, etc.

355 JOHN REID and
WM. H. BARNUM,
Attorneys for Appellant.

IN THE APPELLATE COURT, FIRST DISTRICT, ILLINOIS.

Wilson Ames
vs.
Robert Moir *et al.* } No. 2,759. *Appeal, Cook Superior.*

I, John J. Healy, Clerk of the Appellate court within and for the First district of Illinois, hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said Appellate court, on the 4th day of October, A. D., 1887, by said appellant.

In testimony whereof, I have hereunto set my hand and seal of said court, at Chicago, this 29th day of January, A. D. 1889.

JNO. J. HEALY,
Clerk of the Appellate Court, First District, Illinois.

356 And be it remembered that afterwards, to wit: on the said 6th day of March, A. D. 1889, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the Appellate court of Illinois, First district, in the words and figures following, viz.:

At a term of the Appellate court, begun and held at Chicago, on

Tuesday, the second day of October, in the year of our Lord, one thousand eight hundred and eighty-eight, within and for the First district of the State of Illinois.

Present, Hon. GWYNN GARNETT, Presiding Justice.
" " JOS. E. GARY, Justice.
" " THOS. A. MORAN, Justice.
JOHN J. HEALY, *Clerk.* C. R. MATSON, *Sheriff.*

Wilson Ames
No. 2759 *vs.*
Robert Moir, John Nicol and James Peterson. } *Appeal, Cook Superior.*

Be it remembered, that on the 21st day of February A.D. 1888, it being one of the days of October Term A. D. 1887, certain proceedings were had in said court and entered of record, in words and figures following, to wit:

Wilson Ames
2,759 *vs.*
Robert Moir *et al.* } *Appeal, Cook Superior.*

357 This cause having this day been reached in the call of the docket, was argued by counsel for the respective parties, and the court not being fully advised in the premises, doth order that said cause be taken under advisement.

And be it further remembered, that afterwards, to wit: on the 3rd day of July, A. D. 1888, a judgment was rendered in said cause in said Appellate court, and entered of record in the words and figures following, to wit:

Wilson Ames
No. 2,759 *vs.*
Robert Moir, John Nicol and James Peterson. } *Appeal, Cook Superior Court.*

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises,

for that, it appears, to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that that record is no error; therefore, it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the
358 court that the said Robert Moir *et al.*, appellees, recover of and from the said Wilson Ames, appellant, their costs by them in this behalf expended, and that they have execution therefor.

This order of judgment set aside by order of court August 8, A. D. 1888.

JNO. J. HEALY, *Clerk.*

And afterwards, to wit: on the 8th day of August, A. D. 1888, the following proceedings were had and entered of record in said cause, to wit:

Wilson Ames
2759 *vs.* } *Appeal Cook Superior.*
Robert Moir *et al.*

The court having considered the petition for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be granted.

And afterwards, to wit: on the 4th day of October, A. D. 1888, the following proceedings were had and entered of record in said cause, to wit:

Wilson Ames
2759 *vs.* } *Appeal Cook Superior.*
Robert Moir *et al.*

This cause having this day been reached in the call of the
359 docket, and no one appearing to argue the same, and the court not being fully advised in the premises, doth order that said cause be taken under advisement on briefs filed herein.

And be it further remembered, that afterwards, to wit: on the 7th day of December, A. D. 1888, a judgment was rendered in said cause in said Appellate court, and entered of record in the words and figures following, to wit:

Wilson Ames
No. 2759 *vs.*
Robert Moir, John Nicol and
James Peterson.

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that that record is no error. Therefore, it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said Robert Moir *et al.*, appellees, recover of and
360 from the said Wilson Ames, appellant, their costs by them in this behalf expended, and that they have execution therefor.

And afterwards, to wit: On the 7th day of December, A. D. 1888, the following proceedings were had and entered of record in said cause, to wit:

Wilson Ames
vs. } 2,759. *Appeal Cook Superior.*
Robert Moir *et al.*

This day came appellant, by his counsel, and moved the court for an appeal from the judgment of this court in said cause to the Supreme court of Illinois, and the court being fully advised in the premises doth allow an appeal herein to the Northern Grand Division of said Supreme court, on condition that appellant doth, within twenty days from this date, execute and file in said cause a good and sufficient appeal bond in the penal sum of fourteen thousand dollars, with surety thereto to be approved by this court.

And afterwards, to wit: On the 21st day of December, A. D. 1888, the following proceedings were had and entered of record in said cause, to wit:

361 Wilson Ames *vs.* Robert Moir *et al.* } 2,759. *Appeal Cook Superior.*

This day came appellant, by his counsel, and presented his certain appeal bond in said cause in the penal sum of fourteen thousand dollars, with James W. Ellsworth as surety thereto, and the court, being fully satisfied as to the qualifications of said surety, doth order that said appeal bond be, and the same is, hereby taken, approved, and ordered filed herein.

And on the same day, to wit: December 21st, A. D. 1888, the following appeal bond was filed in said cause in words and figures following, to wit:

* * * * *

363 I, John J. Healy, Clerk of the Appellate court in and for the First District of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order, proceedings, and bond of the said Appellate court in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate court, at Chicago, this 28th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

[COURT SEAL.] JNO. J. HEALY,
Clerk of the Appellate Court of the First District.

IN THE SUPREME COURT OF ILLINOIS, NORTHERN GRAND DIVISION, MARCH TERM, A. D. 1889.

Wilson Ames, *Appellant,* *vs.* Robert Moir, John C. Nicol and James Peterson, late partners under the name of Robert Moir & Co., *Appellees.* } *Appeal from Appellate Court of First District.*

Now comes the appellant, by his attorneys, and says that in the record and proceedings aforesaid of the Appellate court (in-
364 cluding the record filed in said Appellate court, and now filed in this court) there are manifest errors in this, to wit:

1st. The Appellate court erred in that it did not sustain each

and all of the assignments of error made in said court for the reversal of the judgment of the Superior court of Cook county in said cause.

2d. The Appellate court erred in rendering a judgment affirming the judgment of the Superior court of Cook county.

For which, and divers other errors appearing of record, the appellant prays that said judgment may be reversed, &c., with directions to said Appellate court to reverse the judgment of the Superior court of Cook county.

JOHN G. REID, and
WM. H. BARNUM,
Attorneys for Appellant.

365 And be it remembered, that afterwards, to wit: on the 13th day of March, A. D. 1889, certain proceedings were had and orders made by said court and entered of record, among which is the following, viz:

Wilson Ames
No. 105 *vs.* } *Appeal from First District.*
Robert Moir *et al.*

Now on this day come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court.

Therefore it is ordered by the court that this cause be and the same is hereby taken under advisement.

366 STATE OF ILLINOIS, SUPREME COURT, NORTHERN GRAND DIVISION.

At a Supreme court begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand eight hundred and eighty-nine, within and for the Northern Grand Division of the State of Illinois.

Present: Simeon P. Shope, Chief Justice; John Scholfield, Justice; Benj. D. Magruder, Justice; David J. Baker, Justice; Alfred M. Craig, Justice; Joseph M. Bailey, Justice; Jacob W. Wilkin, Justice; George Hunt, Attorney General; Lawrence Morrissey, Sheriff; Alfred H. Taylor, Clerk.

Be it remembered, that afterwards, to wit: on the 31st day of October, A. D. 1889, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

Wilson Ames
vs.
Robert Moir.
} *No. 35 A. D.*
Appeal from First District.

367 Opinion by CRAIG, J.

This was an action of assumpsit brought by Robert Moir & Co. in the Superior court of Cook County *vs.* Wilson Ames, to recover the price of one hundred barrels of highwines sold by the plaintiffs to the defendant on the 9th day of June, 1870. The action was brought upon a contract in writing which was as follows:

"CHICAGO, June 9, 1870.

"CONTRACT.

"I have this day bought of Robert Moir & Co. one hundred (100) barrels highwines, 'iron bound,' at one dollar seven cents ($1.07) per proof gallon. The conditions of sale are as follows: The buyer can call from 1st July to 20th of same month by giving three days' notice, and if not called for by the 20th July the seller has the privilege of delivering up to the end of July by giving three days' notice; to be delivered in fifty barrel lots. To insure the fulfillment of this contract, a margin of three hundred dollars will be put up by both parties.

WILSON AMES."

This instrument of writing, after it was executed by Ames on the day it bears date, was at once delivered to the agents of Moir & Co. and accepted by them; on the same day a margin of $300 was put up by each party as provided in the agreement. It also appears that on the 15th day of July, 1870, Ames notified the agents of Moir & Co. to deliver the highwines; upon receipt of the notice the highwines were on July 18 delivered by Moir & Co., and accepted by Ames, but Ames has never paid for the goods. This action

was not commenced until the 13th day of January, 1886, and the first question presented by the record is whether the action is barred by the statute of limitations. The statute in force at the time
368 the agreement was executed was the act of Nov. 5th, 1849, Sections 1 and 2 of which is as follows:

SEC. 1. "All actions founded upon any promissory note, simple contract in writing, bond, judgment, or other evidence of indebtedness in writing, made, caused or entered into after the passage of this act, shall be commenced within sixteen years after the cause of action accrued and not thereafter."

SEC. 2. "All actions founded upon accounts, bills of exchange, orders, *or upon promises not in writing*, express or implied, made after the passage of this act, shall be commenced within five years next after the cause of action shall have accrued, and not thereafter."

Gross' Stat. Ill., (Ed. 1869) p. 430.

It is strenuously insisted in the argument that the paper executed by Ames, is not a simple contract in writing within the meaning of the first section of the Act of 1849. The action was commenced before the expiration of sixteen years after the cause of action accrued, and if the agreement executed by Ames is a simple contract in writing within the meaning of section one of the act, then the action is not barred. If, on the other hand, section two is to control, then the action is barred. Bishop on Contracts, Enlarged Ed. Sec. 163, defines a written contract as follows: A written contract is one which, in all its terms, is in writing. In *Abrams* v. *Pomeroy*, 13 Ill., 133, a contract of guaranty executed only by the grantor, was held to be a written contract, and that it could not be varied by parol evidence. In *Ill. Cen. R. R. Co.* v. *Johnson*, 34 Ill., 393, an agreement executed by the agent of the railroad company,
369 binding it to transport and deliver certain goods, was held to be a written contract within the purview of the statute limiting actions on such contracts to sixteen years.

In *Dunning* v. *Price*, 56 Ill., 338, a plea of statute of limitations of five years, was held not to be a good plea to a count in an action of assumpsit on a written contract, wherein the assignee of a judgment agreed to pay to the judgment creditor a certain sum upon certain specified conditions.

In *Janay* v. *Horn*, 64 Ill., 379, this court held that an action against a bank on an account, evidenced by the entries in the depositor's bank book, is not under the statute of limitations of 1849 barred, until the lapse of sixteen years after the cause of action accrued. It is true this contract in question was not executed by Moir & Co., but notwithstanding that fact, we think it was their contract, and when they

accepted it they became bound by its terms. From the face of the paper, the parties to the contract are plainly indicated. Ames is described as the purchaser, and Robert Moir & Co. as the seller; the goods bought and sold are clearly described, and the amount to be paid; the time when the goods are to be delivered is specified, and to insure the fulfillment of the contract by the respective parties, a margin of three hundred dollars is put up. Indeed we find no element wanting in the paper to make it a complete and obligatory contract binding upon each of the parties. When Moir & Co. accepted the paper as a contract, they became bound by its terms and conditions, as completely as if they had in form signed the paper. It was in our opinion a contract in writing within the meaning of the statute. See also *Plumb* v. *Campbell*, unreported. After the highwines had been delivered late in the afternoon of July 18th, Ames absented himself from his place of business, and could not be found
370 by the agents of Moir & Co. to make a demand of payment for the highwines; they directed the porter in charge of Ames' warehouse, to take care of the goods until morning when they would call for the pay. When the agents called in the morning Ames was nowhere to be found, and they found that he had shipped fifty barrels of the highwines for New York, and the remaining fifty barrels were loaded in cars ready for shipment. Phillips & Carmichel immediately replevied the fifty barrels which were found in cars in Chicago, and went on to Detroit, Michigan, where they overhauled the other fifty barrels, and they were also replevied. Phillips & Carmichel sold the wines thus replevied to Shufeldt & Co. at ninety-seven cents per gallon, the market price at that time, and deposited the proceeds in bank to await the result of the replevin suits. It appears that between the time the wines were delivered, late in the afternoon of July 18th, and the time the agents reached Ames' store next morning, Ames had sent all the wines to the Michigan Central depot, shipped them, obtained bills of lading which were attached to drafts on the consignee in New York, one for $2,800, and the other for $2,900, which drafts he discounted at the National Bank of Commerce on the security of the bills of lading. The replevin suits were defended by the National Bank of Commerce, and the defense interposed, that the bank was the pledgee of the highwines from Ames in good faith, and without notice of Moir & Co.'s rights, was in the end sustained. (See *Mich. Cen. R. R. Co.* v. *Phillips*, 60 Ill., 190), and the money realized on the sale of the highwines to Shufeldt & Co. was turned over to the National Bank of Commerce in payment of the drafts. In view of the fact that the wines were thus replevied and sold by the agents of Moir & Co., it is insisted that Moir & Co. elected to rescind the contract under which the

371 highwines were sold to Ames, and having so elected, they cannot now maintain an action upon it. It may be conceded that a contract for the sale of goods cannot be rescinded, and at the same time an action be maintained upon it for the contract price of the goods. But we do not understand that the contract in this case was rescinded, or that any effort whatever was made to rescind the contract. When the wines were delivered, Moir & Co. were entitled to payment; the delivery and payment were concurrent acts, and Moir & Co. were not bound to part with the absolute possession of the goods, until they received the price named in the contract; in other words, they had a lien on the goods for the purchase money which they were under no obligations to relinquish until payment was made. In *Canadian Bank* v. *McCrea*, 106 Ill., 298, this court held that when goods were placed by the vendor in the hands of the purchaser, in expectation that he will immediately pay the price, and he fails to do so, the vendor is at liberty to regard the delivery as conditional, and may at once reclaim the goods. But by holding the possession of the goods, or reclaiming them after the purchaser refuses to pay, the contract of sale is not thereby rescinded. The vendor merely retains possession to enforce his lien as vendor. What are the rights of a vendor of goods when the vendee refuses to pay upon delivery, or on offer to deliver goods? This question arose in *Bagley* v. *Findlay*, 82 Ill., 525, and this court held that the vendor had three remedies: 1. The vendor may store the goods for the vendee, give notice that he has done so, and then recover the full contract price. 2. He may keep the goods, and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery. 3. The vendor
372 may sell the goods to the best advantage, and recover of the vendee the loss, if the goods failed to bring the contract price. The same rule is laid down in Benjamin on Sales, 2 Ed., Sec. 788. Here the possession of the goods was fraudulently obtained with the view to ship them out of the state, and not pay the purchase money agreed to be paid. As against Ames, Moir & Co. had the right to replevy the goods, not for the purpose of rescinding the contract, but for the purpose of asserting the vendor's lien, and holding the possession of the goods until Ames should pay for the same. It turned out, however, that the action of replevin was unavailing, as the goods had by the act of Ames passed into the custody of innocent purchasers, before they were reached by the writ of replevin, and the proceeds of the goods were used in payment of the advances of the Commercial National Bank. Benjamin on Sales, Sec. 735, 2d Ed., says: The vendor's remedy after a re-sale made in the absence of an express reservation of the right, is assumpsit on the

original contract, which was not rescinded by the re-sale. This was the course pursued here, and we regard it correct. We have been referred in the argument to *Kellogg* v. *Turpie*, 93 Ill., 265, and *Doan* v. *Lockwood*, 115 Ill., 490; and also cases decided in the courts of other states, where it has been held that the rescission of a contract of sale, where there was fraud in the contract, was inconsistent with a subsequent action on the contract; that if the contract was rescinded by the vendor on the ground of fraud in the contract, a subsequent action on the contract itself could not be maintained.

We concur fully in the law as laid down in those cases, but they have no application to the facts of this case; as heretofore stated,

373 the commencement of the action of replevin was not a rescision of the contract by Moir & Co., but it was a proceeding to enforce the vendor's lien—to place the wines in that position, the vendors had the right to hold them in, until the vendee should pay for them.

It is also contended that Ames' discharge in bankruptcy was a bar to the action. Section 5,117 of the bankrupt act is as follows: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

Whether the debt in this case was created by the fraud of Ames, was a question of fact upon which the judgment of the Appellate court is conclusive. But it is said incompetent evidence was admitted upon this question. No evidence was introduced, except such as tended to establish fraud on behalf of Ames, and the sufficiency of the evidence was a question for the jury. But it is said the debt was created when the contract was executed June 9, 1870, and up to this time there was no fraud on the part of Ames. The debt was not entirely created until Ames induced the agents of Moir & Co. to place the wines in his possession, and if he obtained the possession by fraud, with the intent to ship the goods out of the country, and thus defeat the lien of the vendors, those were facts from which the jury might infer fraud within the meaning of the bankrupt law.

Darling v. *Woodward*, 54 Vt., 101.

It is apparent from the evidence that Ames had no intention of paying for the wines when he called for them on the 15th

374 day of July. His object seemed to be to get possession and control of the wines, and convert them to his own use without payment; this the evidence tends to show he did; and thus the debt was created. We think the evidence submitted to the jury was competent. The defendant offered to prove that Ames settled the

action of replevin with Phillips & Carmichael, a short time after the suit was commenced. The offered evidence was excluded and the decision of the court is relied upon as error. It nowhere appeared that the agents had any authority from Moir & Co. to make any settlement, and in the absence of authority what they may have done, would not be binding on Moir & Co. Objection is made to the ruling of the court on the instructions to the jury. It is said the first and third given for the plaintiff were erroneous. The court in these instructions placed a construction on the written contract read in evidence, which it was proper to do. The fourth and eighth instructions given for plaintiff are criticised, but we perceive no substantial objection to them. Three instructions were given for the defendant, and several others were refused, and the court gave one instruction on its own motion. We have examined the instructions given and those refused, and without entering upon a discussion of those given or refused we are satisfied that the law involved in the case was fairly given to the jury, and that so far as instructions are concerned, no substantial error was committed.

The judgment of the Appellate court will be affirmed.

Affirmed.

375 And thereupon, to wit: on the day and year last aforesaid, to wit: the 31st day of October, A. D. 1889, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

Wilson Ames *vs.* Robert Moir, John C. Nicol and James Peterson, late partners, as Robert Moir and Co.	*Appeal from Appellate Court of Illinois, First District.*

And now on this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that there is no error.

Therefore, it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court, that the said appellees recover of, and from the said appellant their costs by them in this behalf expended, and that they have execution therefor.

376 At a Supreme court begun and held at Ottawa, on Tuesday, the fourth day of March, in the year of our Lord One Thousand Eight Hundred and Ninety, within and for the Northern Grand Division of the State of Illinois.

Present, SIMEON P. SHOPE, Chief Justice.

JOHN SCHOLFIELD, Justice. ALFRED M. CRAIG, Justice.
BENJ. D. MAGRUDER, Justice. JOSEPH M. BAILEY, Justice.
DAVID J. BAKER, Justice. JACOB W. WILKIN, Justice.
GEORGE HUNT, Attorney General. LAWRENCE MORRISSEY, Sheriff.
ALFRED H. TAYLOR, Clerk.

Be it remembered, to wit: on the 10th day of March, A. D. 1890, the same being one of the days of the term of court aforesaid, the following proceedings were, by said court, had and entered of record, to wit:

8 R. H. Wilson Ames *vs.* Robert Moir, *et al.* } *Appeal from First District.*

Now, on this day this cause coming on to be heard upon the petition of the appellant for a rehearing, and the court being now duly advised in the premises. It is considered and ordered by the court that said petition for a rehearing be overruled and denied. And it is further considered by the court that said petitioner pay the costs and charges herein taxed.

376 STATE OF ILLINOIS, NORTHERN GRAND DIVISION. } ss.

SUPREME COURT OF THE STATE OF ILLINOIS.

Wilson Ames,
Appellant,
vs.
Robert Moir, John C. Nicol and James Peterson, late partners, as Robert Moir & Co.,
Appellees.

To the Chief Justice of the Supreme Court of Illinois:

Your petitioner, Wilson Ames of Chicago, Cook county, Illinois, respectfully represents unto your Honor that a final judgment was entered by the Supreme court of the State of Illinois, on the tenth day of March, A. D. 1890, in the case therein pending in the Northern Grand Division thereof, wherein your petitioner, was appellant, and Robert Moir, John C. Nicol and James Peterson, late partners as Robert Moir and Company, were appellees, and by which judgment your petitioner believes that injustice has been done
377 him. And your petitioner represents that said cause was originally commenced in the Superior court of Cook county, Illinois, to recover a debt claimed to be due the appellees by your petitioner: That your petitioner filed in said cause in said court, pleas setting forth his discharge in bankruptcy in accordance with the act of Congress to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and the amendments and additions thereto; that your petitioner claimed in and by such pleas, that the debt (if any there was) due from him to the appellees, and which was the sole cause of action in said cause, was one provable under said bankrupt law; and that his said discharge under said law was a bar and discharge of the cause of action against him; that the appellees filed replications to said pleas, alleging that the debt sought to be recovered in said cause was created by the fraud of your petitioner, and therefore by a provision of said bankrupt act in that behalf, excepted from the operation of the discharge in bankruptcy set forth in said pleas: That your petitioner filed rejoinders to said replications, alleging that the said debt (if any there was) was not created by fraud, within the meaning of said bankrupt act; and this was the principal issue tried in said cause.

And your petitioner further shows that on June the 18th, 1887,

judgment was rendered in said Superior court of Cook county against your petitioner for the sum of ten thousand six hundred and thirty-four dollars and ten cents and costs; and thereby your petitioner claims he was wrongfully deprived of the benefit of his said discharge in bankruptcy.

378 Your petitioner further shows that an appeal was taken by him to the Appellate court of the First district of Illinois, and there by said court the judgment of said Superior court of Cook county was affirmed, and thereupon an appeal was taken by your petitioner to the Supreme court of the State of Illinois, in and for the Northern Grand Division, and at the October term, 1889, of said last-named court, the judgments of said Appellate court, and said Superior court of Cook county, were affirmed; and, thereupon, your petitioner petitioned said Supreme court of Illinois, for a rehearing of said cause; which, at the March term, 1890, to wit: on the tenth day of March, 1890, was denied. And your petitioner shows that the principal question in said cause, was whether the debt sought to be recovered, and the one for which judgment was originally entered and affirmed, as aforesaid, was created by the fraud of your petitioner within the meaning of said bankrupt act, so as to prevent the discharge pleaded from being a bar and discharge of the sole cause of action in said cause. And that the Supreme court of the State of Illinois held, in said cause, that the debt therein was created by the fraud of your petitioner within the meaning of said bankrupt law; and that, therefore, your petitioner's discharge in bankruptcy was of no avail as a defense in said action; which decision, involved a construction of one or more of the sections of said bankrupt act, and had to be, and necessarily was, made upon and in relation to said bankrupt act. And so your petitioner represents that he had in said cause rights, privileges or immunities under said bankrupt

379 act, which were denied him, as he claims, by said decision of said Supreme court of Illinois, and, as said court is the highest court in which a decision in said suit can be had, your petitioner represents that, under and in accordance with the provisions of the statutes of the United States in that behalf, he is entitled to have said decision of affirmance by the Supreme court of the State of Illinois, reviewed by the Supreme court of the United States by writ of error.

Your petitioner, therefore, prays that a writ of error, to operate as a *supersedeas* to said judgment of affirmance, may be allowed, to have said records and proceedings in said cause reviewed by the Supreme court of the United States at Washington, in accordance with the statute in such case made and provided.

And your petitioner will ever pray, etc.
April 12, A. D. 1890. WILSON AMES,
Petitioner.

JOHN G. REID and
WM. H. BARNUM,
Attorneys for Wilson Ames.

The prayer of the above petition is hereby allowed. Bond of petitioner in the sum of $16,000, with James W. Elsworth as surety, approved.
April 14, 1890.

S. P. SHOPE,
Chief Justice Supreme Court of Illinois.

380 And afterwards, to wit: on the 14th day of April, A. D. 1890, there was filed in the clerk's office of said court a certain bond in words and figures following, viz.:

KNOW ALL MEN BY THSE PRESENTS, that we, Wilson Ames, as principal, and James W. Ellsworth, as surety, both of the City of Chicago, County of Cook, and State of Illinois, are held and firmly bound unto Robert Moir, John C. Nicol and James Peterson, late partners under the firm name of Robert Moir & Co., in the penal sum of sixteen thousand dollars, lawful money of the United States; for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this twelfth day of April, in the year of our Lord one thousand eight hundred and ninety.

The condition of this obligation is such that, whereas the said Robert Moir, John C. Nicol and James Peterson, late partners under the firm name of Robert Moir & Co., on the 18th day of June, A. D. 1887, recovered a judgment in the Superior court of Cook County, Illinois, against the above bounden Wilson Ames, for the sum of ten thousand six hundred and thirty-four dollars and ten cents damages, besides costs of suit, and which said judgment was afterwards, on appeal therefrom prosecuted in said court by the said Wilson Ames, affirmed by the judgment of the Appellate court for the First District of Illinois, on the seventh day of December, A. D. 1888, with costs of appeal, and from which last mentioned judgment of affirmance, the said Wilson Ames prosecuted a further appeal in said cause to the Supreme court of Illinois in the
381 Northern Grand Division, and such proceedings were thereupon had in the said Supreme court of Illinois, that afterwards, to wit: on the 31st day of October, A. D. 1889, the Supreme court of Illinois by its judgment affirmed the said judgment of said Appellate

court so affirming said judgment of said Superior court in said cause, and rendered judgment therein against said Ames for costs, and afterwards, to wit: on the tenth day of March, A. D. 1890, denied a rehearing therein petitioned for by said Ames.

And whereas, the above bounden Wilson Ames, has sued out a writ of error from the Supreme court of the United States to the Supreme court of Illinois, to reverse the said judgment of the said Supreme court of Illinois in said cause, against the said Robert Moir, John C. Nicol and James Peterson, as defendants in error. Now, therefore, if the above bounden Wilson Ames shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

WILSON AMES, [L. S.]
JAMES W. ELLSWORTH, [L. S.]

Sealed and delivered in presence of

JOHN G. REID.

Approved April 14, 1890.

S. P. SHOPE,
Chief Justice Sup. Ct. of Illinois.

382 UNITED STATES OF AMERICA, } ss.
STATE OF ILLIN OIS. }

THE UNITED STATES OF AMERICA.

To the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said Supreme Court, between Wilson Ames, plaintiff in error, and Robert Moir, John C. Nicol and James Peterson, late partners under the firm name of Robert Moir & Co., defendants in error, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Wilson Ames, plaintiff in error, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1890, in the Supreme Court to be then

and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twelfth day of [SEAL.] April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th year.

W. H. BRADLEY,
Clerk U. S. Circuit Court Nor. Dist. Ill

383 UNITED STATES OF AMERICA, NORTHERN DISTRICT OF ILLINOIS. } ss.

To Robert Moir, John C. Nicol and James Peterson, late partners under the firm name of Robert Moir & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1890, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Illinois, wherein Wilson Ames is plaintiff in error, and you are defendants in error, to show cause, if any there may be, why the final judgment rendered against said plaintiff in error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Simeon P. Shope, Chief Justice of the [SEAL.] Supreme Court of Illinois, this 15th day of April in the year of our Lord one thousand eight hundred and ninety.

A. H. TAYLOR,
Clerk of the Supreme Court of Illinois, Northern Grand Division.

I hereby acknowledge service of the within citation this 18th day of April A. D. 1890, on said defendants in error, Robert Moir, John C. Nicol and James Peterson, late partners under the firm name of Robert Moir & Co., and hereby enter my appearance for said defendants in error in said cauae.

J. K. EDSALL,
Atty. for Defts. in Error.

384 To the Honorable, the Chief Justice and Associate Justices of the Supreme court of the United States:

I, Alfred H. Taylor, clerk of the Supreme court of Illinois, in and for the Northern Grand Division of said state, and keeper of the records and seal thereof, do certify and return to the said annexed writ of error that the copy of the record and proceedings in said Supreme court of Illinois, hereunto annexed is a full, true and correct copy of all the record and proceedings in said Supreme court of Illinois in said cause, wherein Wilson Ames was appellant, and Robert Moir, John C. Nicol and James Peterson, late partners under the firm name of Robert Moir and Co., were appellees, wherein judgment was rendered by said Supreme court of Illinois, against the said appellant on the thirty-first day of October, A. D. 1889.

Witness my hand and the seal of the Supreme court of Illinois, at Ottawa, in the said Northern Grand Division of said state, this twenty-second day of April, in the year of our Lord, One Thousand Eight Hundred and Ninety.

[SEAL.]

A. H. TAYLOR,
Clerk of the Supreme Court, Illinois.

385 UNITED STATES OF AMERICA, ss.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1890.

Wilson Ames,
Plaintiff in Error,
vs.
Robert Moir, John C. Nicol and James Peterson, late partners as Robert Moir & Company,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

ASSIGNMENT OF ERROR.

And now comes said Wilson Ames, plaintiff in error in the above entitled cause, by John G. Reid and William H. Barnum, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The Supreme court of the State of Illinois erred, in holding and deciding that the Superior court of Cook county, in said state,
386 where said cause was originally commenced and tried, did not err in admitting upon such trial the evidence admitted by said Superior court on the part of the plaintiffs therein, the defendants in error herein, to sustain their replications that the debt sued for, and the only cause of action, was created by fraud, and hence the discharge in bankrutcy pleaded by the defendant therein, the plaintiff in error herein, was not a discharge of or bar to such action, and in overruling the objections of the present plaintiff in error to the admission of said evidence.

2d. The Supreme court of the State of Illinois erred, in holding and deciding that said Superior court of Cook county did not
387 commit error, in refusing upon the trial to admit proper evidence offered by the defendant therein, and plaintiff in error herein, to sustain his rejoinders to the replications mentioned in the first assignment of error herein, to wit: that the debt (if any there was) sued for, and the only cause of action, was not created by fraud within the meaning and intent of the act of Congress in that behalf, and that his discharge in bankruptcy pleaded by him was a complete defense to and discharge of such debt or cause of action.

3d. The Supreme court of the State of Illinois erred, in holding and deciding that the said Superior court of Cook county, did not commit error in the giving to the jury on behalf of the plaintiffs

therein, defendants in error herein, certain written instructions relating to what is fraud in the creation of a debt, within the meaning and intent of the United States Bankrupt Act, such as will deprive one of the benefit of a discharge under said Act, and also relating to the evidence produced and admitted to show that
388 the debt sued for was created by fraud, and that therefore the said discharge in bankruptcy pleaded was no discharge of the same; to the giving of which said instructions, exceptions were duly taken.

4th. The Supreme court of the State of Illinois erred, in holding and deciding that said Superior court of Cook county, did not commit error in the giving to the jury, of its own motion, its instruction as to what is the law concerning fraud in the creation of a debt within the meaning and intent of the Bankrupt Act of the United States in that behalf, and such as will prevent a defendant from receiving any benefit from a discharge under such Bankrupt Act—also, did not commit error in its same instruction to the jury, upon and concerning the evidence produced and admitted for the purpose of showing fraud in the creation of the debt sued for in said cause.

5th. The Supreme court of the State of Illinois erred, in holding and deciding that the evidence produced and admitted on the trial of said cause in the said Superior court of Cook county, on behalf of the plaintiffs therein, defendants in error herein, upon the issue made by the pleadings, that the debt sued for, and only cause of action, was created by fraud within the meaning and
389 intent of the Bankrupt Act of the United States in that behalf, was sufficient and proper to sustain the verdict of the jury upon such issue, and that said Superior court did not commit error in overruling the motion for a new trial, in which was specially assigned as causes therefor, the errors of said Superior court in its rulings upon the admission and exclusion of evidence upon said issue relating to the said discharge in bankruptcy, and as to whether the debt sued for was created by fraud or not, and as to its giving and refusing to give instructions, upon said bankruptcy issue, and did not commit error in rendering judgment thereon against the present plaintiff in error, and thus depriving him of the benefit of his discharge in bankruptcy, pleaded by him in discharge of the debt, and only cause of action, sued for.

6th. The Supreme court of the State of Illinois erred, in holding and deciding that said Superior court of Cook county, properly refused to give to the jury certain instructions asked for by the
390 defendant therein, and plaintiff in error herein, relating to the issue made by the pleadings and the evidence produced on the

trial in regard thereto, as to whether such defendant therein was entitled to receive the benefit of his discharge in bankruptcy as pleaded by him.

7th. The Supreme court of the State of Illinois erred, in affirming the decision and judgment of the Appellate court of the First district of the State of Illinois, wherein said bankruptcy question was a direct issue, which latter court affirmed the proceedings and judgment of said Superior court of Cook county.

8th. That the testimony produced and admitted upon the trial of said cause in said Superior court of Cook county, on behalf of the plaintiffs therein, the defendants in error herein, for the purpose of showing that the debt sued for, and only cause of action therein, was created by fraud, in connection with the testimony in defense of such issue, was not sufficient and proper to establish fraud in the creation of the debt sued for, such as would prevent the defendant therein, plaintiff in error herein, from receiving the benefit of his said discharge in bankruptcy, pleaded by him, and such testi-
391 mony did not justify the verdict, nor the overruling of the motion for a new trial, in which was specially assigned as causes therefor, that the verdict was contrary to the law and evidence upon such issue, nor the judgment upon such issue against the plaintiff in error, and the Appellate court for the First district of the State of Illinois, and the Supreme court of the State of Illinois, erred, and each erred, in ratifying and affirming said action and proceedings of said Superior court of Cook county upon said issue.

9th. The said Superior court of Cook county erred, in rendering the judgment in said cause against the plaintiff in error herein, thereby depriving him of the benefit of his discharge in bankruptcy, pleaded by him in discharge of the debt, and only cause of action, sued for, and which said discharge had been issued to him in accordance with the act of Congress in that behalf, and the Appellate court in and for the First district of the State of Illinois, and the Supreme court of the State of Illinois erred, and each ered, in ratifying and affirming said action and judgment of said Superior
392 court of Cook county, wherefore said plaintiff in error prays that said action and judgments of said Superior court of Cook county, said Appellate court for the First district of the State of Illinois, and of said Supreme court of the State of Illinois, be reversed, &c.

JOHN G. REID and
WILLIAM H. BARNUM,
Attorneys for Plaintiff in Error.
Room 29, Metropolitan Block, Chicago, Illinois.

392 JOINDER IN ERROR.

Now come, etc., defendants in error, by James K. Edsall, their attorney, and say that in the record, etc., aforesaid, there is no error as above assigned, and pray that the judgment of the Supreme court of the State of Illinois may be affirmed, and they adjudged their costs, &c.

J. K. EDSALL,
Attorney for Defendants in Error.

1404

Office Supreme Court U. S.
FILED.
JAN 9 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

WILSON AMES,
Plaintiff in Error,
vs.
ROBERT MOIR, JOHN C. NICOL AND JAMES PETERSON, LATE PARTNERS UNDER THE FIRM NAME OF ROBERT MOIR & CO.,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT

FOR PLAINTIFF IN ERROR.

JOHN G. REID,
WILLIAM H. BARNUM,
ATTORNEYS FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

WILSON AMES,
Plaintiff in Error,
vs.
ROBERT MOIR, JOHN C. NICOL AND JAMES PETERSON, LATE PARTNERS UNDER THE FIRM NAME OF ROBERT MOIR & CO.,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

STATEMENT.

It becomes necessary in the following statement to refer to phases of the case which may seem at first irrelevant to the federal questions involved, but the relevancy of the same will appear before its conclusion, and in the argument.

In June and July, 1870, Wilson Ames, the plaintiff in error, was engaged in business at Nos. 13 and 15 River street, in the city of Chicago, as a rectifier and wholesale dealer in whiskies and highwines, and so had been, either alone or as a member of firms, for some two or three years previous. In June and July, 1870, the defendants

in error, under the firm name of Robert Moir & Co., were engaged in business at Oquawka, in Illinois, as distillers, merchants and bankers, and had been so engaged for several years previously.

In June and July, 1870, Robert Moir, the senior member of said firm, was a member of the board of trade in Chicago, and so had been for some years, and ever since has been; and said Ames has, also, since previous to June, 1870, been a member of said board of trade. The firm of Phillips & Carmichael, in June and July, 1870, were the brokers at Chicago of said firm of Robert Moir & Co., and so had been for many years, and, according to the testimony of Thomas S. Phillips and George S. Carmichael, two members of the firm of Phillips & Carmichael, in a suit between them, hereinafter referred to, which was put in evidence in this case, said Moir had his office with them, said Phillips & Carmichael.

In June, 1870, it was hoped and expected by many dealers in whiskies and highwines that Congress, which was then in session, would place an increased tax upon whiskies, etc., and upon such expectation many dealers in that line made option contracts for July delivery, and there was what is called a "flurry" in that line of goods on the board of trade, and, among others who caught the fever of speculation, was Ames, the plaintiff in error, who made large contracts with various parties, giving him the right to call, and they to deliver on his failure to call, at stated sums per proof gallon, during the month of July, when Congress was expected to adjourn.

All the parties agree that there was an oral contract, made in June, 1870, upon the board of trade for the purchase and sale of 200 barrels of highwines, July delivery, at $1.07 per proof gallon.

The memorandas subsequently made as was claimed, being two, and each for 100 barrels, provided, that Ames could call from the 1st to the 20th of July, to be delivered within three days from time of such call in fifty-barrel lots, and if not called for by Ames within said period, then Robert Moir & Co. had the privilege, upon three days' notice, to deliver during the balance of July.

Ames put up $3 per barrel, being $600, as margins, in the hands of Phillips & Carmichael, agents of defendants in error. After the making of this oral contract, and after the date of the alleged written one, and on or about July 6th to 10th (Abst., 99, 100), highwines having declined upon the market, Robert Moir insisted that further margins should be put up by Ames, and that the margin should be kept good in accordance with the rules of the board of trade; that the contract, being between members of the board, and made upon the board, was governed by its rules, and that as the price had declined, Ames must put up further margins, and this view of *the* contract was held by both (Abst., 100) Wallace, the broker, through whom it was made, and also by Carmichael, to whom Moir applied for its construction. Thereafter, and before any call was made, Ames and Carmichael frequently met upon the board, and at such times Carmichael asked him when he, Ames, was going to call, and said (Abst., 121) that if he didn't call by the 20th, they should deliver, and gave him to understand that he had got to take the highwines in any event. On July 15, Congress adjourned without having increased the tax, and on that day Ames called upon Carmichael (Abst., 120, 121), and wanted to settle the contract by forfeiting the $600 which had been put up by him as margins. Carmichael refused to do

this, and said that as the distillery of Robert Moir & Co. had been destroyed by fire, and to fill the contract they, Phillips & Carmichael, would have to go upon the market and buy the highwines, they would settle upon the difference between the contract and market price, and allow him, Ames, from a quarter to half a cent extra. Ames refused to accept this offer, and said (Abst., 121), if I have got to take the highwines, you can deliver 100 barrels of them at the depot of the Michigan Central Railroad Company. This call made the wines deliverable on the 18th. The market for this class of goods was east, and Ames and other dealers were at that time carrying large quantities of them at New York, Boston, etc., so as to avail themselves of any sudden rise in the market price, and for another reason, viz: these wines were bought for speculation, and to realize a profit might have to be carried for some time, and as money had to be realized upon them to pay the vendors, it could be borrowed upon the highwines as security, at seven per cent. there, while the rate of interest in Illinois was at that time ten per cent. Previous to this contract with defendants in error, Ames had made (Abst., 112) arrangements with W. S. Miller & Co., of New York, to receive all highwines he might ship them, and advance him money on same at seven per cent., and to carry same for him until he ordered a sale. This same arrangement (Abst., 115, 116) had been made previously with the same party, by the firm of which Ames had formerly been a member, and of which he was successor. Ames kept a bank account at that time with the National Bank of Commerce of Chicago, and he had arranged with said bank to discount his drafts, made on W. S. Miller & Co., with the bills of lading attached, and thus he was enabled

to pay with checks on such bank, the vendors of highwines to him. At that time, such payments (Abst., 155) were always made by uncertified checks, and in the regular course of business, the bank would not be called upon to pay same, until at least the day after they were given, and thus, as will be seen, when a party was making consignments daily, and making drafts against same, the proceeds of one day's consignments would be ready to meet payment of checks given for the purchases of the previous day. At this time the United States Revenue Department, for the purpose of showing the tax had been paid, and for the purpose of identifying the highwines, required that the seller should furnish to the purchaser a government certificate, showing that the law or regulation of the department had been complied with, and such certificate was usually sent to the buyer with the bill, and then, *and not until then*, according to the custom, could the seller demand a check in payment. The usual custom was to deliver one day, and send bill with government certificate the next, or some subsequent day, and then, according to the custom, such bill was paid with an uncertified check. Phillips & Carmichael, upon this call by Ames, notified their principals, the defendants in error, of the same, and they were authorized to go into the market and buy one hundred barrels of highwines, and deliver them to Ames, and on July 18th, said Phillips & Carmichael, in pursuance of such instructions, bought fifty barrels of Conklin & Bro. and fifty barrels of Thomas Lynch & Co., at 98 cents per proof gallon, and instructed them to deliver same at Ames' place of business (Abst., 64), and to make out their respective bills, and collect from Ames at $1.07 per proof gallon, the contract price with Moir & Co., and pay over to them, said Phillips &

Carmichael, the difference between their price and such contract price, viz: nine cents per proof gallon. There is no evidence, however, that Ames knew of any such instructions, or that he was expected to pay anything to Conklin & Bro. or to Thomas Lynch & Co.

The highwines were delivered at Ames' place of business by Conklin and by Lynch, on July 18th, finishing at about 6 P. M. Ames that afternoon gave instructions to his shipping-clerk to ship the next day *via* Michigan Central railroad, two car-loads, which would be 100 barrels, of highwines, but not any particular barrels, to W. S. Miller & Co., New York, and either the same day or the next morning, to his book-keeper to draw drafts on said Miller & Co. The next morning 100 barrels of highwines were so shipped, bills of lading procured, and same taken with drafts attached to the National Bank of Commerce and discounted, as customary, and the amount of the two drafts, $5,700, was placed to his credit, and this (Abst., 111, 112), was just what Ames had been doing right along, almost daily. Ames, on his way back to his place of business met one Frank Barnes, of the firm of Barnes Brothers, of Akron, Ohio, who informed him that the sheriff was in charge of his place of business, under an execution against him, and insisted that Ames should secure Barnes Brothers, who were creditors to the amount of about $10,000. They proceeded to Ames' place of business, and there found the sheriff in charge, as stated by Barnes, and upon his insisting that Ames should secure his firm, he then, at his place of business, made out a check on said National Bank of Commerce for $6,000, and gave same to said Barnes, and, as Barnes was a stranger in the city, went to the bank with him, had the check certified, and iden-

tified Barnes so that he could draw the money when he pleased, and the money was thereafter, and during the same day, paid to Barnes. Ames, it appears, on his purchase of his partner's interests in the rectifying apparatus and business on or about May 1, 1870, some two and a half months previous, had given them a judgment note for several thousand dollars, and they, knowing of his extensive speculation in highwines, and that the tax had not been increased as expected, and believing that he would be financially ruined, unexpectedly and without any previous demand or notice, caused judgment to be entered up on this note, execution issued, and levy made upon everything that he had at his place of business, and the result was, that it was impossible for him to do any more business, as his credit, for the time being, in Chicago was ruined, and other creditors commenced suits, and parties with whom he had contracts would not deliver. Up to this time, viz: until after the time of the levy of the execution, Ames was solvent (Abst., 110, 111), and no one claims but that Ames' credit and standing as a business man was first-class. His credit at the bank was good, and it had several times (Abst., 125) paid his overdrafts to the extent of several thousand dollars, and even after this levy, if Ames had been called upon to pay the bill for the 100 barrels of highwines, he could and would have done so, as he had arrangements (Abst., 119) whereby friends in the east would advance him money, and they did advance him nearly $50,000, to settle with creditors, and to go into business again; and, also, at this time, to wit: July 19th, he had at his place of business (Abst., 124, 125), remaining after the aforesaid shipment, highwines and whisky upon which, if there had not been any levy, he could have at once realized sufficient to pay

and discharge all claims of the defendants in error, if he had been called upon to do so.

Phillips & Carmichael, the Chicago agents of the defendants in error, on this same forenoon of July 19th, finding the sheriff in charge of Ames' place of business, and ascertaining that the 100 barrels of highwines that had been delivered the day before on the Moir contract by Conklin & Bro., and by Thomas Lynch & Co., as aforesaid, had been shipped by Ames via the Michigan Central railroad, went to the depot of that road and found that fifty of the barrels were still there, and that the other fifty barrels had just left on a train; they then went to the office of W. C. Goudy, their attorney, and he commenced a suit in their own names, but for their principals, the defendants in error, as is stated (Abst., 20) in the affidavit, in the Superior court of Cook county, and replevied the fifty barrels that were at the depot, being the fifty barrels that Phillips & Carmichael had bought of Conklin & Bro., and these fifty barrels were by Phillips & Carmichael sold on "'Change," as it is called, that day to H. H. Shufeldt & Co., and taken directly from the depot to the place of business of said H. H. Shufeldt & Co., and the same afternoon Mr. Phillips, of Phillips & Carmichael, took a train and went to Detroit, and there, upon a replevin writ, obtained possession of the other fifty barrels, and they were immediately shipped back to Chicago, and likewise sold to H. H. Shufeldt & Co., and the proceeds of the 100 barrels was paid to said Phillips & Carmichael and by them placed in the Union National Bank of Chicago, to their own credit. Phillips & Carmichael immediately notified the defendants in error, their principals, of what had been done, gave them full details of the proceedings, and Mr. Peterson, one of the

defendants in error, came at once to Chicago, and, as Thomas S. Phillips and George S. Carmichael both claimed in subsequent litigation, appeared to be pleased with what they, Phillips & Carmichael had done in the premises. A few days afterwards Robert Moir, the one who had had this matter in charge from the commencement, appeared in Chicago, and then learned of what had been done; that Phillips & Carmichael had attempted to make a delivery of the 100 barrels to Ames—of the shipment, and two replevin suits—of the sale of the 100 barrels to H. H. Shufeldt & Co, and the receipt of the money therefor, and that some bank claimed a lien as pledgee, by virtue of having discounted drafts of Ames, with bills of lading attached, and as far as Phillips & Carmichael understood, and as they testified, he appeared to be perfectly satisfied, at this time, with what they, Phillips & Carmichael, had done in the premises, and they heard not a word of complaint from any of the defendants in error until a month or six weeks thereafter, and it appears that this complaint was not as to what they had done, but was *solely* at their refusal to pay over the money they had obtained from Shufeldt & Co. until they had been reimbursed for their expenses, etc.

After this failure of Ames, but at what exact date does not appear, as all books and papers of Ames, as well as those of Phillips & Carmichael, were destroyed in the great fire of October, 1871, but certainly as early as some time during the month of September, 1870, Phillips & Carmichael (Abst., 101) placed this $600, that Ames had put up in their hands as margins, to the credit of the defendants in error, at the Union National Bank of Chicago, where defendants in error had a bank account, and defendants in error (Abst., 101) admit they received the same.

The replevin suits were against the Michigan Central Railroad Company alone, as a defendant, but the National Bank of Commerce claiming a lien as pledgee of the 100 barrels of highwines, by reason of its discount of the drafts of Ames, with bills of lading attached, as aforesaid, came in and defended both suits, but, as far as appears, the one in Detroit was never litigated, but laid in abeyance awaiting the result of the one in Cook county, Illinois, and finally was disposed of in accordance with the final judgment in that case.

It appears that Ames settled with the bank and with the agents of the defendants in error, soon after the commencement of said replevin suits, and agreed with each that he would, as each requested, keep the fact of such settlements secret, and not interfere in said suits, as each was content to fight the matter out in court, if he only would stay away, and pay each a certain sum, which he did. Ames performed his part of the settlements, and was not called as a witness by either party, and after such settlements, gave the matter no further thought, as he now, as he fully supposed, owed neither party anything on account of the 100-barrel transaction, including the claim of the bank as pledgee thereof. After this failure on July 19, 1870, caused as aforesaid, Ames having arrangements with eastern parties, whereby he could obtain what money he wanted, settled some of the claims against him, and as he could not settle all; and as his credit was destroyed for the time being at least, sought to procure employment, and on or about January, 1871, entered the employ of Dickinson, Leach & Co., distillers at Chicago, as a traveling salesman, and so continued traveling for said firm continuously, until on or about 1876, when he became a stockholder and treasurer of

the Phœnix Distilling Company of Chicago, one of the largest concerns in that line in the state, with its distillery, office and headquarters in the city of Chicago, and has ever since continued to be such a stockholder and treasurer of said company. In January, 1870, being previous to the transaction with defendants in error, the wife of Ames had gone east on a visit, and being taken ill, she remained there, and after Ames commenced traveling as aforesaid, he was at Saratoga, New York, with his wife more than at any other place, and called that place his residence, and voted there, and on the 28th day of March, 1872, a petition in bankruptcy was filed against him in the District court of the United States, for the Northern district of New York, upon which he was adjudicated a bankrupt, and such proceedings were had therein that on the 13th day of September, 1872, he received a decree of discharge from said court, by which he was discharged from all debts and claims, which, by the bankrupt act, were made provable agrinst his estate, and which existed on the 28th day of March, A. D. 1872, excepting such debts, if any, as are by such act excepted from the operation of a discharge in bankruptcy.

During the time Ames was searching for employment, asaforesaid, being the period of about six months next after his failure, as aforesaid, he was in Chicago most of the time, and frequently met Phillips & Carmichael, and thereafter, until he again took up his residence in Chicago, which is somewhat indefinite, as he and family were boarding, and not keeping house, but was between 1872 and 1875, he, Ames, spent at least a week each month in Chicago, and from the latter date, and from perhaps earlier, he continuously resided there, and was an officer and member of a prominent business firm, engaged in the same line

of business as the defendants in error, and during all that time was a member of the board of trade in Chicago, as was also Robert Moir, one of the defendants in error, and Ames never has been (Abst., 118) asked to pay for said 100 barrels; never had a bill therefor presented to him by Conklin & Bro., or by Thomas Lynch & Co., or by Phillips & Carmichael, or by Robert Moir & Co., the defendants in error, and never after the retaking of the highwines by the replevin writs in July, 1870, and the settlement in or prior to September, 1870, supposed, or heard a whisper from any source, that the defendants in error, or any one else, had, or pretended to have, any claim of any kind or nature against him, arising from the contract made on "'Change" with the defendants in error through Wallace, being the only contract he ever made with them, in so far as the same relates to the 100 barrels delivered and replevied as aforesaid, or any claim upon such contract for the remaining 100 barrels, not called for or delivered, or upon any contract or claim of any kind, until after January 13, 1886, nearly sixteen years thereafter, when this suit was commenced. The suit is in assumpsit, brought by Robert Moir & Co, the defendants in error, against Wilson Ames, the plaintiff in error, and the declaration consists of two special counts (Abst., 3–6), both based upon the following alleged paper in writing, which is copied into one of the counts, and a copy given in the bill of particulars, viz. (Abst., 5):

"CHICAGO, June 9, 1870.

"*Contract*:

"I have this day bought of Robert Moir & Co. one "hundred (100) barrels highwines, 'iron-bound,' at one "dollar seven cents ($1.07) per proof gallon. The con-"ditions of sale are as follows: The buyer can call

"from 1st July to 20th of same month, by giving three "days' notice, and if not called for by the 20th July, the "seller has the privilege of delivering up to the end of "July by giving three days' notice. To be delivered in "fifty-barrel lots. To insure the fulfillment of this con- "tract, a margin of three hundred dollars will be put up "by both parties.

WILSON AMES."

"

5 cent
U. S. Int.
Revenue
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It is alleged in each count, that each party put up $300; that on July 15, 1870, Ames called upon the plaintiffs "under said writing or agreement," for the delivery of 100 barrels of highwines three days thereafter, to wit: on July 18th, and that on said July 18, 1870, "the plaintiffs *delivered* to the defendant under said writing or "agreement," one hundred barrels of highwines, which "were then and there accepted and received by said de- "fendant under said writing or agreement." It is further averred that "upon the delivery of said highwines to the "defendant," it became his duty to pay, etc.; that he has not paid, etc.; and the *ad damnum* is placed at $20,000.

The plaintiffs did not file any affidavit of claim, and the defendant did not file any sworn plea or affidavit, denying the execution of this paper, and he offered upon the trial to show why he did not, viz: that at this late day, nearly sixteen years after its alleged execution, it was an utter impossibility for him to remember, whether or not he ever signed any such paper, which was not now in existence and subject to his inspection; but the court

refused to allow him to do so, as it also refused to allow him to show that, if this paper was ever signed by him, it was done as a mere memorandum, and not as being *the* contract between the parties, and to each of such rulings, exceptions were duly taken.

At the time of the filing of the pleas, the only knowledge Ames or his attorneys had of the result of the replevin suit, and of other litigation, after his settlement as aforesaid, or of any of the evidence in those cases, was such as was derived from reading the case of the *Michigan Central Railroad Co.* v. *Phillips et al.*, found in the 60th Illinois Reports, page 191, and the case of *Philips et al.* v. *Moir et al.*, in the 69th Illinois Reports, page 156, as the files and bill of exceptions in the first case in the Superior court had been destroyed by fire, and in the latter case were missing and could not be found. The pleas filed by the defendant, Ames, are as follows: 1st. The general issue. (Abst., 7.) 2d. Discharge in bankruptcy dated September 13, 1872, and therein giving a copy of the discharge. 3d. Discharge in bankruptcy in another form. (Abst., 9.) 4th. That the supposed causes of action did not accrue within five years, etc. 5th. That the several supposed causes of action, if any ever existed, are and each is subject to the statute of limitation enacted November 5, 1849, and that the so-called instruments in writing, in the several counts of the plaintiffs' declaration mentioned, are not, nor is either of them, a "simple contract in writing," or an "evidence of indebtedness in writing," within the meaning and intent of section 1 of said act; that plaintiffs' right and rights of action, if any ever existed upon said so-called instruments in writing, are, and upon each is, limited by and subject to the provisions of section 2 of said act; that by said

section 2, plaintiffs' right of action was limited to the period of five years from and after the same accrued to them, and that same did not accrue within the five years next before the commencement of this suit, etc. 6th. That after the making of the supposed promises, and after the time of the alleged delivery of the 100 barrels of highwines, and before the commencement of this suit, to wit: On July 19, 1870, the defendant failed in business, and became and was insolvent; that plaintiffs, in consideration of defendants' then insolvent condition, proposed to the defendant that they would accept and receive the $300, deposited and put up as a margin as stated in the declaration, and an additional $300, similarly deposited and put up as a margin in another matter, between defendant and plaintiffs, and being in all $600, and all the property and money of the defendant, as a compromise, and in full satisfaction and discharge of all claims and demands they had or could have against the defendant, for and on account of the supposed contract sued on, and of the alleged sale and delivery of the 100 barrels of highwines mentioned in the declaration; that defendant accepted of said proposition, and authorized said plaintiffs to receive, and that plaintiffs received said sum of $600, so put up as margins, as a compromise, and in full satisfaction, and discharge of the several promises and of all sums of money mentioned in the declaration.

7th. Same as the sixth, except that the sum of $300 was paid and received as a compromise, etc.

8th. That plaintiffs ought not to be permitted to have their action, etc., because that after the alleged delivery of the 100 barrels of highwines, plaintiffs caused said 100 barrels to be replevied, by instituting two suits against the railway company that at that time had received said

highwines for transportation—one of said suits being in the State of Michigan, and the other in Cook county, Illinois, and each being for fifty barrels; that in the prosecution of said suits, and on the trial thereof respectively, it was claimed, urged and insisted upon, for and on behalf of the plaintiffs therein, that there never had been any delivery of said 100 barrels of highwines, or of any part thereof, by the plaintiffs therein to the defendant, under the alleged contracts or instruments in writing mentioned in plaintffs' declaration; ready to verify, and prays judgment if said plaintiffs ought to be permitted, against and contrary to their said claim in said suits, and each of them, to now allege that they delivered said 100 barrels of highwines, as in their declaration is contained.

9th. That plaintiffs ought not to be permitted to have their aforesaid action against the defendant, because he says that subsequent to the time of the alleged delivery of said 100 barrels of highwines to the defendant, as mentioned in plaintiffs' declaration, and, within a few days thereafter, plaintiffs' agents recovered possession of the same 100 barrels of highwines by virtue of replevin writs, and sold and disposed of all of the same for and on behalf of their principals, the plaintiffs in this action; that plaintiffs ratified and confirmed said action of their said agents, and thereafter brought suit in the Circuit court of Cook county, Illinois, to recover the proceeds of said sale by such agents of said 100 barrels of highwines; avers that said suit against said agents was to recover the proceeds of the sale of the same 100 barrels of highwines, the price and value of which is sought to be recovered in this action; ready to verify, and prays judgment if plaintiffs are not now estopped, by reason of their aforesaid action against their agents, from having this action against this defendant.

Plaintiffs, by leave of court, filed the following replications to the second, third, sixth and seventh pleas, to wit:

First replication to second and third pleas (Abst., 10): *Precludi non*, because they say there is not any record of said supposed discharge in bankruptcy remaining, etc.

Second replication to second and third pleas: *Precludi non*, etc., because they say that the said debt in plaintiffs' declaration mentioned and sought to be recovered, was created by the fraud of the defendant, and this they are ready to verify, etc.

Third replication to second and third pleas. (Abst., 10–12.) *Precludi non*, etc., because they say that the said highwines so sold and delivered by plaintiffs to defendant, as stated in the declaration, were so sold and delivered, not upon credit, but for cash, to be paid by defendant to the plaintiffs therefor on delivery, and that plaintiffs caused said 100 barrels of highwines to be delivered in successive dray or truck loads, in the usual course of business, at the storehouse of defendant in Chicago, during the 18th day of July, 1870, with the understanding that the terms of said contract, in the declaration mentioned, would be complied with, and that said highwines would be paid for when such delivery was completed; that such delivery was not completed until near the close of business hours, to wit: 6 o'clock in the afternoon of that day; that when such delivery was so completed defendant was not present, and could not be found at his said place of business, to make payment for said highwines, and he did not pay for the same; that it was then so late in the day that plaintiffs' agents, who had charge of the delivery of said highwines, could not on that day cause said

highwines to be removed from defendant's storehouse; and so they were compelled to permit said highwines to remain in defendant's storehouse until the next day, to wit: July 19, 1870, without receiving payment therefor. Plaintiffs aver that defendant was then and there insolvent, and about to fail in business, and that such insolvency was then well known to defendant, but wholly unknown to plaintiffs, and that immediately after said highwines had been so delivered at defendant's storehouse, under said contract declared upon, the defendant, well knowing he had not paid for said highwines, and had no right to dispose of the same until after he had paid therefor, and without the knowledge or consent of plaintiffs, and fraudulently intending not to pay for said highwines, and to place the same where the plaintiffs could not enforce their rights therein to secure payment of the purchase price therefor, and thereby to cheat and defraud the plaintiffs in the premises—caused said highwines to be delivered to the Michigan Central Railroad Company, to be shipped from Chicago, consigned to a consignee at city of New York; that defendant then and there procured said railroad company to issue to him bills of lading for said highwines, and that defendant then and there drew drafts upon said consignee for $5,700, attached said drafts to said bills of lading, and delivered same to the National Bank of Commerce of Chicago, and procured said bank to discount said drafts for defendant, on the credit of said bills of lading so attached; that said bank did so discount said drafts, on the security of said bills of lading, and gave the defendant credit at said bank for the amount thereof, upon which defendant drew checks to the amount of said drafts, which checks were then and there certified, and afterwards paid by said bank; that de-

fendant thereby fraudulently invested said bank with a lien and claim on said highwines for the amount of said drafts, not only as against the defendant, but also as against plaintiffs, notwithstanding defendant had not paid plaintiffs for said highwines; all of which was contrived and done by defendant, with intent to, and the defendant thereby did, obtain said highwines without payment therefor, as required by said contract, and thus cheat and defraud the plaintiffs in the premises; that after defendant had so obtained and disposed of said highwines, he neglected to pay plaintiffs for said highwines, as required by said contract; and so plaintiffs in fact say, that said debt in the declaration mentioned, and sought to be recovered in this suit, was created by the fraud of said defendant, and is, by the act of Congress in that behalf, excepted from the operation of said supposed discharge in bankruptcy in said pleas mentioned; ready to verify, etc.

Replications were filed to the sixth and seventh pleas, to the effect that they did not propose to nor receive either of said sums as a compromise, and in satisfaction of their claim, as alleged; and that they did not cause said 100 barrels of highwines to be replevied and obtain possession thereof, etc., as alleged.

To these replications the defendant rejoined as follows (Abst., 12, 13):

To the first replication to the second and third pleas, and each of them, which plaintiffs are ready to verify by the record, etc., the defendant doth the like.

To the second replication to the second and third pleas, the defendant says, etc., the supposed debt was not created by the fraud of the defendant, as alleged in said replication, and concludes to the country, etc.

To the third replication to the second and third pleas, the defendant says plaintiffs ought not, by reason of anything in that replication alleged, to have their supposed claim excepted from the operation of the discharge in bankruptcy, because he says that the debt, if any ever existed, was not created by the fraud of the defendant, etc., and concludes to the country, etc.

Demurrers were filed to the fourth, fifth, eighth and ninth pleas, and sustained by the court, and exceptions taken.

The trial of this cause commenced on May 16, 1887, before the Hon. Kirk Hawes and a jury, and the plaintiffs, without objection, offered in evidence the (Abst., 20–26) affidavit, declaration, pleas and judgment of the Superior court of Cook county, as the same appear in a transcript from the Supreme court of Illinois, in the aforementioned replevin suit commenced by Phillips & Carmichael against the Michigan Central Railroad Company, and appealed to the Supreme court. In this affidavit for the replevin of the fifty barrels furnished by Conklin, made by one of the firm of Phillips & Carmichael, on July 19, 1870, the affiant states (Abst., 20), that Robert Moir & Co. (the defendants in error) "are the *owners* of" the fifty barrels; that Phillips & Carmichael "are the agents of said Robert Moir & "Co., and as such are lawfully entitled to the possession "thereof," etc. The declaration is in the usual form, and the pleas are as follows:

1st. *Non cepit.* 2d. *Non detinet.* 3d. Property in one J. C. Conklin. 4th. (Abst., 23.) Property in National Bank of Commerce. 5th. Property in National Bank of Commerce, "as security for money loaned "upon said goods and chattels as pledges for the repay-

" ment of the same," etc. (The 3d, 4th and 5th above pleas are in the replications referred to as being numbered 5th, 6th and 7th, caused undoubtedly by the filing of the pleas of *non cepit* and *non detinet* twice.) The replevin case was tried by the court, without a jury, on May 3, 1871, and the court found (Abst., 26) the defendant guilty and rendered judgment, that plaintiffs have and retain the property replevied, and recover their costs, and the damages assessed at one cent, and the defendant appealed.

It was admitted that the original files in this replevin suit were destroyed in the great fire, and plaintiffs therein, the defendants in error herein, proved that the bill of exceptions, and a claimed original of the paper sued on here was introduced in evidence in that case, and that both were destroyed in said fire. They then proved that Thomas S. Phillips and George S. Carmichael, two members of the firm of Phillips & Carmichael, and the plaintiffs in that replevin suit, were examined as witnesses, and are now both deceased.

Messrs. Otis, Horton and Goudy, witnesses for the plaintiffs in this action in said Superior court of Cook county, testified that they were each engaged as attorneys in said replevin suit, and remembered substantially the evidence of said Phillips and said Carmichael, as given in that replevin suit, and that the bill of exceptions as prepared therein was correct; and then the plaintiffs offered to read in evidence in this case, what purports to be their testimony in that replevin suit, appearing in a transcript of the same, made by the clerk of the Supreme court from the record filed in that court; to which counsel for defendant Ames objected, on the grounds that the testimony was taken in a suit between different

parties from those in this case; that that suit involved different matters; that the issues to be tried were different, and that the defendant in this case was not a party and had not an opportunity of cross-examination; but the court overruled the objection, to which exception was taken by the defendant, and thereafter counsel for plaintiffs, subject to exception, read from this transcript all of the testimony of said Phillips and said Carmichael, and the same is embodied verbatim in the bill of exceptions, and appear in the record in this case. Counsel for Ames, whilst the admissibility of this testimony of these dead witnesses in that replevin suit was being argued, said they would waive the going through in detail with each of these witnesses, Otis, Horton and Goudy, as to what the testimony of said Phillips and Carmichael was in that replevin suit, and consented that if their testimony in that case was admissible here, to save time, the same might be read from this transcript, Ames objection being that the testimony of those witnesses in the replevin suit is not admissible here, and the objection was not as to the mode of proving same.

Without this evidence of these deceased witnesses, plaintiffs in the court below, and defendants in error here, had no evidence tending to prove their replication to the pleas of discharge in bankruptcy, nor any evidence as to the claim that the paper sued on was ever in existence, or intended to be a contract between the parties.

Moir & Co. offered in evidence the mandate from the State Supreme court, reversing and remanding said replevin suit, to which Ames objected, upon the ground of its irrelevancy, and claimed that the institution of those replevin suits, the obtaining of the highwines upon the replevin writs, and sale of same to H. H. Shufeldt & Co.

(which was admitted to have been done), and the prosecution of the replevin suit to judgment, could only be and was, upon the theory of a disaffirmance or rescission, or both, of the sale of the highwines to Ames, or upon the theory of a non-delivery, or non-legal delivery, and that the highwines was still their property after the attempted delivery, as well as before; was an election between inconsistent and antagonistic remedies, and it does not concern Ames as to what action was had in the Supreme court. The court overruled the objection, and exception was taken.

The plaintiffs, Moir & Co., offered in evidence the record of the judgment in the replevin suit in the Superior court, rendered after its reversal in the Supreme court and in accordance with its decision, and on July 5, 1872, from which it appears (Abst., 34) that the court found all of the issues for the plaintiffs, except the one made by the fifth plea, and that was that the property and right to the possession was in the National Bank of Commerce "as pledges to secure the repayment of money "loaned upon the same," which finding and judgment, the plaintiff in error, Ames, claimed and now claims, was an adjudication that the *title* and ownership was in Moir & Co., subject to the lien of the bank.

The plaintiffs, Moir & Co., were allowed, notwithstanding defendant's objections and exceptions, to show that the defendant, Ames, after the 100 barrels of highwines came into his possession, consigned the same to a party in New York, procured bills of lading from the railway company, and attached the same to drafts made by Ames on the consignee, and had same discounted by the National Bank of Commerce, and then checked out the proceeds of same. Plaintiffs claimed that same was admissi-

ble, for the purpose of showing such fraud, as would prevent defendant from receiving the benefit of his discharge in bankruptcy, whilst defendant claimed, and insisted, that none of that kind of evidence was admissible for any such purpose, or for any purpose in this case; that the language, a "debt created by fraud," as used in the bankrupt act, does not apply to any such facts as plaintiffs offer to prove; that the debt sued on in this action is a debt *created* by a claimed written contract; that plaintiffs have declared as upon a written contract, and were compelled to do so, on account of the statute of limitations, and they must prove that the debt was *created* by a written contract, and this being the law, how was it, the debt, created by fraud, when there is no pretense that there was any fraud at the time of the making of this contract, if it is one, and none of the facts desired to be proven existed until *after* the debt was created, and if fraudulent at all, could only apply to an evasion of payment of a debt previously created.

Independent of the questions and issues made in the State courts, the only ones requiring consideration here are as follows, viz:

First. Were any of the acts claimed to have been committed by the plaintiff in error, Ames, after the delivery of the high wines at his place of business, and for the most part, if not all as he insists, upon the next day, proper evidence, or any evidence, to show that the debt, if any there is, was *created* by fraud, within the meaning of the bankrupt act?

Second. Even if all the evidence was admissible, does it show such fraud as should bar Ames from receiving the benefit of his discharge in bankruptcy?

Third. Did the state court err in the refusing or the giving of instructions relating to the foregoing issues?

The court excluded from the jury, but allowed to go into the record, a transcript of the pleadings, etc., of a suit commenced in assumpsit, common counts, by Robert Moir & Co., against their agents, said Phillips & Carmichael, commenced in the Circuit court of Cook county, for the November term, 1870, to recover the money received, viz: as appears in copy of account sued on, endorsed on the declaration (Rec., 312), viz:

" Phillips & Carmichael,

" To R. Moir & Co., Dr.

" July, 1870. To money received of H. H.
" Shufeldt for one hundred
" barrels of highwines *of ours*
" sold them $6,400 00
" Credited by commissions.. 100 00"

A verdict was rendered for the plaintiffs, Moir & Co., and against the defendant, Ames; exception taken, motions for new trial, and in arrest of judgment, made and overruled, and exceptions taken to each, and judgment rendered on June 18, 1887, for the amount of the verdict, viz.: $10,634.10, and the defendant, Ames, appealed to the Appellate court, where said judgment was affirmed, and then an appeal was taken to the Supreme court of the State of Illinois, where it was likewise affirmed.

Counsel for plaintiff in error claimed in the state courts, and now claim in this court, that the shipment and consignment of the 100 barrels of highwines, and the discount of the drafts, was done without any intention to defraud any one, but in the usual and regular course of

business, and that the evidence proves that such was the fact, and that according to the custom governing contracts made on the board of trade, and of the kind that are called "cash on delivery," it was not expected that vendee should pay for the same immediately upon the receiving manual possession thereof, or that he should not exercise any acts of ownership, until he had actually paid the price; that the recovery of the highwines upon the replevin suits, by the agents of the defendants in error, but for their benefit; the sale of the same to H. H. Shufeldt & Co. and the demand, and suit by Moir & Co. against their agents for the identical money received upon such sale, was a rescission of the sale, and a ratification of the acts of their agents, and same was an election of remedies; and further, that the receipt by said Moir & Co. of the $600 was a ratification of the settlement made, and that they are bound thereby. Defendants in error never made any claim against Ames, but as one ofthem testifies (Abst., 80, 81), no charge against him appears upon the books of their firm.

The Supreme court of the State of Illinois sustained each and all of the rulings, findings, and judgments of the lower courts, and in so far as relates to the federal questions involved, plaintiff in error claim it committed error.

Assignment of Error.

(Abst., 197-199.)

And now comes said Wilson Ames, plaintiff in error in the above entitled cause, by John G. Reid and William H. Barnum, his attorneys, and says that, in the record and proceedings aforesaid, there is manifest error in this, to wit:

First. The Supreme court of the State of Illinois erred, in holding and deciding that the Superior court of Cook county, in said state, where said cause was originally commenced and tried, did not err in admitting upon such trial the evidence admitted by said Superior court on the part of the plaintiffs therein, the defendants in error herein, to sustain their replications that the debt sued for, and the only cause of action, was created by fraud, and hence the discharge in bankruptcy pleaded by the defendant therein, the plaintiff in error herein, was not a discharge of or bar to such action, and in overruling the objections of the present plaintiff in error to the admission of said evidence.

Second. The Supreme court of the State of Illinois erred, in holding and deciding that said Superior court of Cook county did not commit error in refusing upon the trial to admit proper evidence offered by the defendant therein, and plaintiff in error herein, to sustain his rejoinders to the replications mentioned in the first assignment of error herein, to wit: that the debt (if any there was) sued for, and the only cause of action, was not created by fraud within the meaning and intent of the act of Congress in that behalf, and that his discharge in bankruptcy

pleaded by him was a complete defense to and discharge of such debt or cause of action.

Third. The Supreme court of the State of Illinois erred, in holding and deciding that the said Superior court of Cook county did not commit error in the giving to the jury on behalf of the plaintiffs therein, defendants in error herein, certain written instructions relating to what is fraud in the creation of a debt, within the meaning and intent of the United States Bankrupt Act, such as will deprive one of the benefit of a discharge under said Act, and also relating to the evidence produced and admitted to show that the debt sued for was created by fraud, and that therefore the said discharge in bankruptcy pleaded was no discharge of the same; to the giving of which said instructions, exceptions were duly taken.

Fourth. The Supreme court of the State of Illinois erred, in holding and deciding that said Superior court of Cook county did not commit error in the giving to the jury, of its own motion, its instruction as to what is the law concerning fraud in the creation of a debt within the meaning and intent of the Bankrupt Act of the United States in that behalf, and such as will prevent a defendant from receiving any benefit from a discharge under such Bankrupt Act—also, did not commit error in its same instruction to the jury, upon and concerning the evidence produced and admitted for the purpose of showing fraud in the creation of the debt sued for in said cause.

Fifth. The Supreme court in the State of Illinois erred, in holding and deciding that the evidence produced and admitted on the trial of said cause in the said Superior court of Cook county, on behalf of the plaintiffs therein, defendants in error herein, upon the issue made by the pleadings, that the debt sued for, and only cause

of action, was created by fraud within the meaning and intent of the Bankrupt Act of the United States in that behalf, was sufficient and proper to sustain the verdict of the jury upon such issue, and that said Superior court did not commit error in overruling the motion for a new trial, in which was specially assigned, as causes therefor, the errors of said Superior court in its rulings upon the admission and exclusion of evidence upon said issue relating to the said discharge in bankruptcy, and as to whether the debt sued for was created by fraud or not, and as to its giving and refusing to give instructions, upon said bankruptcy issue, and did not commit error in rendering judgment thereon against the present plaintiff in error, and thus depriving him of the benefit of his discharge in bankruptcy, pleaded by him in discharge of the debt, and only cause of action, sued for.

Sixth. The Supreme court of the State of Illinois erred, in holding and deciding that said Superior court of Cook county properly refused to give to the jury certain instructions asked for by the defendant therein, and plaintiff in error herein, relating to the issue made by the pleadings and the evidence produced on the trial in regard thereto, as to whether such defendant therein was entitled to receive the benefit of his discharge in bankruptcy as pleaded by him.

Seventh. The Supreme court of the State of Illinois erred, in affirming the decision and judgment of the Appellate court of the First district of the State of Illinois, wherein said bankruptcy question was a direct issue, which latter court affirmed the proceedings and judgment of said Superior court of Cook county.

Eighth. That the testimony produced and admitted upon the trial of said cause in said Superior court of Cook

county, on behalf of the plaintiffs therein, the defendants in error herein, for the purpose of showing that the debt sued for, and only cause of action therein, was created by fraud, in connection with the testimony in defense of such issue, was not sufficient and proper to establish fraud in the creation of the debt sued for, such as would prevent the defendant therein, plaintiff in error herein, from receiving the benefit of his said discharge in bankruptcy, pleaded by him, and such testimony did not justify the verdict, nor the overruling of the motion for a new trial, in which was specially assigned as causes therefor, that the verdict was contrary to the law and evidence upon such issue, nor the judgment upon such issue against the plaintiff in error, and the Appellate court for the First district of the State of Illinois, and the Supreme court of the State of Illinois, erred, and each erred, in ratifying and affirming said action and proceedings of said Superior court of Cook county upon said issue.

Ninth. The said Superior court of Cook county erred, in rendering the judgment in said cause against the plaintiff in error herein, thereby depriving him of the benefit of his discharge in bankruptcy, pleaded by him in discharge of the debt, and only cause of action, sued for, and which said discharge had been issued to him in accordance with the act of Congress in that behalf, and the Appellate court in and for the First district of the State of Illinois, and the Supreme court of the State of Illinois erred, and each erred, in ratifying and affirming said action and judgment of said Superior court of Cook county, wherefore said plaintiff in error prays that said action and judgments of said Superior court of Cook county, said Appellate court for the First district of the State of Illinois, and of said Supreme court of the State of Illinois, be reversed, etc.

BRIEF.

I.

THE VERDICT AND JUDGMENT ARE CONTRARY TO LAW AND THE EVIDENCE, AND THE SUPREME COURT OF THE STATE OF ILLINOIS ERRED IN AFFIRMING SAME.

(*a.*) "Fraud," in U. S. Bankrupt Act, defined, etc.

Sec. 5,117, U. S. Stat. Bankrupt Act.
Neal v. *Clark*, 95 U. S. (5th Otto), 704.
Pierce v. *Shippee*, 90 Ill., 372.
Hunnequin v. *Clews*, 77 N. Y., 427.
" " 111 U. S., 676.
Palmer v. *Hussey*, 87 N. Y., 303.
Cronan v. *Cotting*, 104 Mass., 247.
2 Parsons on Contracts (5th Ed.), 773.
Blow v. *Gage*, 44 Ill., 208.
Wood v. *Clark*, 121 Ill., 359.
Schroeder v. *Walsh*, 120 Ill., 403.
Morris v. *Tillson*, 81 Ill., 607.
Bowden v. *Bowden*, 75 Ill., 143.
Mey v. *Gulliman*, 105 Ill., 285.
Cooley on Torts (Ed. of 1879), pp. 476, 477.
Bump on Fraud. Con. (3d Ed.), pp. 19, 20.
Hide & L. N. Bank v. *West*, 20 Ill., App. Ct. Rep., 61.
Hammond v. *Noble*, 57 Vt., 193.
Noble v. *Hammond*, 129 U. S., 65.
Wolf v. *Stix*, 99 U. S., 1.

(*b.*) "*Debt created* by the fraud * * * of the bankrupt," in Bankrupt Act, defined, etc., and what is a "debt," and when and how it is "created."

Fisher v. *Consequa*, 2 Wash. C. C. Rep., 382.

Bump on Fraud. Con. (3d Ed.), p. 507.

Choteau v. *Jones et al.*, 11 Ill., 318.

Blumenstiel on Bankruptcy, 540.

U. S. v. *Rob Roy*, 13 Bank. Reg., 235.

Jones et al. v. *Knox*, 8 " " 559.

In re Pitts, 19 Bank. Reg., 64.

Warner v. *Cronkhite*, 13 Bank. Reg., 52.

Shuman v. *Strauss*, 10 " " 300.

In re Williams & McPheter, 11 Bank. Reg., 145.

Brown v. *Broach*, 16 Bank. Reg., 296. (S. C., 42 Miss., 536.)

Secs. 5067, 5068, 5118, U. S. Stat., (Bankrupt Act.)

Pierce v. *Shippee*, 90 Ill., 372.

Bump's Bankruptcy (10th Ed.), 742.

Palmer v. *Preston*, 45 Vt., 156.

City of Springfield v. *Edwards*, 84 Ill., 627, 632, 633.

Law v. *People*, 87 Ill., 386, 393, 398.

Prince v. *City of Quincy*, 105 Ill., 138.

Prince v. *City of Quincy*, 105 Ill., 216.

Mattingly v. *Wulke*, 2 Brad. (Ill. App. Ct.), 169.

Erie's Appeal, 91 Pa. St., 398.

Wallace v. *San Jose*, 29 Cal., 180.

Niles v. *Niles*, 11 Amer. & Eng. Cor. Cas., 299.

State v. *Atlantic City*, 9 Atlantic Rep., 760.
Culbertson v. *City of Fulton*, 127 Ill., 30, 36.
Cronan v. *Cotting*, 104 Mass., 247.
Hide & L. N. Bank v. *West*, 20 Ill. App. Ct. Rep., 61.
Noble v. *Hammond*, 129 U. S. 65.
Wolf v. *Stix*, 99 U. S., 1.

II.

THE SUPREME COURT OF THE STATE OF ILLINOIS ERRED IN DECIDING THAT THE SUPERIOR COURT OF COOK COUNTY, IN SAID STATE, DID NOT ERR IN ADMITTING UPON THE TRIAL THE EVIDENCE ADMITTED BY SAID COURT TO SUSTAIN THE REPLICATIONS TO THE PLEAS OF DISCHARGE IN BANKRUPTCY.

Authorities cited under the first assignment, and chiefly under the subdivision (*b*).

III.

THE SUPREME COURT OF ILLINOIS ERRED IN SUSTAINING THE RULINGS OF THE LOWER COURTS, IN RESPECT TO THE GIVING AND REFUSAL OF INSTRUCTIONS RELATING TO THE BANKRUPTCY ISSUE.

(*a.*) Instructions given for defendants in error.

(*b.*) Instruction given by the trial court of its own motion.

(*c.*) Refusal of instructions asked by plaintiff in error.

Authorities cited under the first assignment.

ARGUMENT.

I.

THE VERDICT AND JUDGMENT ARE CONTRARY TO LAW AND THE EVIDENCE, AND THE SUPREME COURT OF THE STATE OF ILLINOIS ERRED IN AFFIRMING THE SAME.

First. The discharge in bankruptcy was a bar to the action. Even if there was a contract, as claimed by defendants in error, and as was held by the State Supreme court, and they were not debarred from commencing this action, either by their conduct or by lapse of time, whatever remedy they might otherwise have had, was, by the discharge in bankruptcy, completely barred. It is admitted that this discharge in bankruptcy is a good defense, unless the facts warrant an exemption from its benefit. The second and third pleas (Abst., 8, 9) are discharge in bankruptcy, to which are filed replications (Abst., 10, 11, 12) that the debt was created by the fraud of Ames, and is, therefore, excepted from its operation. The second and third replications were each demurrable, but rejoinders were filed denying that the debt, if any, was created by fraud, and this was a distinct issue between the parties in each and all of the State courts.

Section 5,117 of the bankrupt act is as follows: "No "debt created by the fraud or embezzlement of the bank- "rupt, or by his defalcation as a public officer, or while "acting in any fiduciary character, shall be discharged by "proceedings in bankruptcy."

For a time after the passage of the bankrupt act, the above section was variously construed by the state and

United States District courts, some holding one way and some another, as to what was meant by the word "fraud" as used therein, until its meaning was finally defined by this court, and its decision was that it means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law.

Neal v. *Clark*, 95 U. S. (5th Otto), 704.

We confidently claim and insist, that there is not the slightest evidence in the whole record of any fraud of that nature in the creation of the debt, and we further claimed upon the trial and took the proper exceptions, and insisted upon the same both in the Appellate court and the Supreme court of the State of Illinois, that each and every act of Ames offered and admitted as tending to show fraud, was inadmissible, because the same happened *subsequent to the creation of the debt,* and if fraudulent in any view, could only be such as to the evasion of payment of a debt previously created. All the evidence relating to the shipment of the highwines, the discount of the drafts, the giving of the check to Barnes Brothers, was objected to upon this ground and exceptions taken (Abst., 30, 42, 55 and others); and the plaintiff in error also (Instructions Nos. 10, 11, 12, 13, Abst., 169; see also Nos. 7, 8, Abst., 168) asked for instructions upon this point, which the court refused to give, and the State Supreme court held that there was no error therein.

There is no claim or pretense that Ames was guilty of any fraud of any nature at the time of the making of a contract for the highwines, whether it was an oral one for 200 barrels, as we claim, or the supposed one declared on. This paper is dated June 9, 1870, and the wines were delivered on July 18th, and there is not one word

of evidence, and we believe no claim made, that Ames was guilty of any fraudulent act or pretense, until after the last above date.

In construing the above section of the Bankrupt act, we will give our views of what is meant by the words "created" and "debt," as used therein. There can be no debt without a *contract* of some kind, either express or implied, and if there is an express one it must create the debt, and so, if the paper declared on is a written contract, as claimed, and, as the State Supreme court held in this case, it must *create* the debt, if any, in this action. The first definition of the word "create," as given by Webster, is "To bring into being; to form out of noth-"ing; to cause to exist." If the paper sued on brought the debt into being, or caused it to exist, it certainly was its origin, and the debt was its creation. If not, what was? There can be no debt without a creditor, and whatever creates a creditor must likewise create a debt. Bouvier defines a creditor—and it is his only definition, as "He "who has a right to require the fulfillment of an obliga-"tion or contract," and hence, if the paper sued on was a valid written contract, as the State Supreme court has decided that it was, it was so at its date, June 9, 1870, and on that day Moir & Company became creditors of Ames, because they then and thereby acquired the right to require its fulfillment. The debt at that time was not due, nor was its exact amount determined, yet, if Moir & Company by the contract became creditors, it certainly created the debt; there was thereby created an obligation, of which the binding force was complete and perfect, but of which the performance or payment could not be required until some future period, and this brings it within the definition of a "*debitum in præsenti solvendum*

"*in futuro.*" The word "debt," as used in text-books, is usually treated *eo nomine*, and as it relates to the action of debt, and thus points out the distinction between that form of action and assumpsit, or covenant, and to come within the definition of "debt," for that form of action, a certain specified sum would have to be due, and even within this definition, it would have to be *created* by a contract. "Create," as applied to a debt, is synonymous with the term "contract."

In *Fisher* v. *Consequa*, 2 Washington, C. C., Rep., 382, it was held that "to constitute such a debt as may "be pursued by foreign attachment under the law of "Pennsylvania, *the demand must arise under a contract*, "*without which no debt can be created*"; and in its discussion of what is a "debt," the court say, page 385:

"A *promise*, whether express or implied, to pay as "much as certain goods or labor are worth," etc., "*creates*, "in common parlance, *a debt;* and the person entitled to "performance does not speak of his claim, as for dam- "ages, but for a debt, to the amount which he considers "himself entitled to."

If the "debt" claimed in this action, did not arise from —have its origin in—was not created by, the contract declared on, then Moir & Co. had no cause of action, for they declared upon that, and no other. The non-payment did not create the debt, as payments are applied on and to discharge a debt already created. If the delivery created the debt, it was created before 6 o'clock P. M. of July 18th. The delivery had its origin in, or was caused by, the contract, and hence the contract created the delivery. If it was a binding contract, there could be a debt, within any definition of that word, without any delivery, as, for instance, if Ames had refused to accept the

goods; therefore, it follows that delivery is not a necessary essential to the creation of a debt.

In Bump on Fraud. Con. (3d Ed.), page 507, in treating of "who are creditors," it is stated:

"It may be laid down as a general rule, that all claims "which arise from contract, are in force from the *date* "of the agreement. *The liability dates from that time*, "although no demand accrues until a subsequent date."

In *Choteau* v. *Jones et al.*, 11 Ill., 318, the court held and say:

"The relation of debtor and creditor between principal "and surety, so as to entitle the latter to avoid a volun- "tary conveyance made by the former, *commences at the* "*date of the obligation* by which the surety becomes "bound, and not from the time he makes payment."

If, as seems to be the law, the relation of debtor and creditor was created by the contract, the fraud that would defeat the discharge in bankruptcy, must have been practiced at as early a date as that of the contract, and evidence of fraud at a later date would not be admissible.

In Blumenstiel on Bankruptcy, in treating of the above section, it is stated, page 540:

"The *inception* of the debt must be fraudulent," and cites *U. S.* v. *Rob Roy*, 13 Bank. Reg., 235. In this case, the government had seized a vessel for violation of law, and the owner went into court and gave a forthcoming bond, and unsuccessfully contested the right of seizure, and afterwards judgment was rendered against him and his sureties. In an action upon such bond he plead his discharge in bankruptcy, and it was replied that the debt was created by fraud, and the court held it was not, say-

ing, page 236: "Now, the appearance of the claimant, "and his binding his property, are the transactions on "which the present suit is based. They cannot be re- "garded as fraudulent. * * * It is said that in "making his defense, the claimant used the evidence of "false witnesses, and swore falsely himself. * * * "But it is not a fraud by which *the debt or obligation* "*was created.*" The court here treat "debt" as synonymous with "obligation," and as having been created by the bond, as we say, the debt or obligation was created by the contract. Now, that bond from its character was, as it must have been, a conditional one; it was not certain that any sum would ever be due or recoverable upon it, and the court say that it created the debt.

That the construction of this section for which we contend is the correct one, clearly appears from another section of same act, viz: Section 5,118, which is as follows: "No discharge shall release, discharge or affect any per- "son *liable* for the same *debt* for or with the bankrupt, "either as partner, joint *contractor*, endorser, surety, or "otherwise." Now, if it had meant merely a debt, of the nature and kind that counsel for defendants in error will contend, viz: one of a fixed sum, and due, how easy it would have been to have said, "others liable for same "debt shall not be released," without specifying partners, joint contractors, etc.; it clearly means a liability on a contract, etc., and even a contingent one.

In *Jones & Cullan* v. *Knox*, 8 Bank. Reg., 559, the court held that, if at the time of the commencement of the bankruptcy proceedings, the debtor was surety on a bond of a guardian, his discharge released him from liability for any default of the principal, although the fact of such default was not determined until after such dis-

charge, and the right of action against the surety did not accrue until such time; and the court say: "We think "it is the *contract, or obligation* to be liable for the de- "fault of the guardian, that the discharge in bankruptcy "relieves from, and not the mere liability on this con- "tract when fixed."

The above clearly shows that the word "debt," as used in the Bankrupt act, means a liability assumed on a bond or contract, at the time same is executed, as well as when the amount has been fixed and become payable.

According to the Bankrupt act, the bankrupt is only discharged from "debts," yet, as shown, under that term, he is discharged from liabilities, and even contingent ones.

In *Palmer* v. *Preston*, 45 Vt., 156, the defendant, by false representations, induced plaintiff's testator to endorse defendant's drafts, and defendant got the proceeds: testator had to pay the drafts, and then he sued the defendant and obtained judgment. This suit was debt on that judgment, and defendant pleaded discharge in bankruptcy, and plaintiff replied, that the debt was created by fraud. The court say that by examining the record, it will be found that the debt evidenced by the judgment, "was *created by the contract* which the defendant en- "tered into when he, as drawer, obtained the endorse- "ment," etc., and the court held that the testator, by electing "to treat it as a debt created by contract," waived all fraud, and the present plaintiff could not reply that the debt was created by fraud, and the discharge was a complete defense.

In re Pitts, 19 Bank. Reg., it is stated, page 64, that "there are some cases, which hold that to bring a debt

"within this section as created by fraud, the fraud must "be the *sole* foundation of the claim, and that a debt is "not created by fraud, if it grows out of a contract, into "which the party was not induced by fraud to enter; that "such a claim cannot be said to be created by fraud, "particularly, after the claimant has elected to sue in "contract," etc., and cite:

Palmer v. *Preston*, *supra*.

Warner v. *Cronkhite*, 13 Bank Reg., 52.

In *Shumann* v. *Strauss*, 10 Bank. Reg., 300, the court held that *where* the original debt arises in contract, and the fraud is but an incident on the debt, and not its creative power, it will be discharged in bankruptcy.

Pierce v. *Shippee*, 90 Ill., 372, was assumpsit to recover money, which plaintiff had advanced to defendants to purchase corn on their joint account, and which it was claimed defendants had wrongfully appropriated to their own use. Discharge in bankruptcy was pleaded, and fraud, etc., was replied, and the court say, page 374: "This record contains no evidence which would warrant "the jury in finding that the debt was *created* by fraud. "So far as is shown, the *money was obtained* in good "faith." Page 376: "So far as the evidence shows, the "only default of the defendants arises from the fact that "they failed to pay over to the plaintiff one-half of the "money; * * * it is a mere breach of contract."

Judge DRUMMOND, *in re* Williams and McPheeter, 11 Bank. Reg., 145, in speaking of this section, said, "shall "not affect debts, * * * which have their *origin* in "fraud," thus defining "create" to mean the origin, and not the result. Defendants in error claim that they had a lien, and if this is so, they had it on the 18th when

goods were delivered, but it was a lien for what? To secure a debt, and according to their theory, the debt must have been created and been in existence on that day, which is sufficient for our purpose, as there is no pretense, certainly no evidence, that any fraudulent act was committed until after such delivery. Bump, in his work on bankruptcy, says (10th Ed., p. 742): "The "debt must be tainted with fraud in its *inception*. The "vice must come into existence with the debt. If the "*contract* was fair and honest when made, the discharge "will release the bankrupt from his liability, although "he was subsequently guilty of fraud in respect to the "debt."

In the case of *Brown* v. *Broach*, 16 Bank. Reg., 296, (S. C., 42 Miss., 536), the court treat the contract as creating the debt at the time of its execution, and use the above language quoted from Bump, and say: "The "deceit was *after* the contract had been created, and "formed, of course, no inducement or element of it." Defendants in error, in the first count of their declaration (Abst., 4), declare upon a sale as made on June 9th, the date of the contract, and if so, the debt must have been then and thereby created, and it will not be claimed that there was any fraud at this time. To "become indebted," certainly includes a debt, and these words have been repeatedly construed as meaning the incurring of a legal liability, even if payable upon a contingency. It is provided by section 12 of article 9 of the constitution of 1870, of the State of Illinois, that no county, city, etc., "shall "be allowed to become indebted in any manner," etc., beyond a certain limit. In the case of *City of Springfield* v. *Edwards*, 84 Ill., 627, the court, in construing the words "became indebted," in the above section, on

page 632 say, they mean "voluntarily incurring a legal "liability to pay. * * * A debt, payable in the future, "is obviously no less a debt than if payable presently; "and a debt payable upon a contingency, as upon the "happening of some event, such as the rendering of serv- "ices, or *the delivery of property*, etc., is some kind of a "debt, and therefore within the prohibition. If a *contract* "or undertaking contemplates, in any contingency to pay "when the contingency occurs, the liability is absolute— "*the debt exists*—and it differs from a present unqualified "promise to pay, only in the *manner* by which the in- "debtedness was incurred." In that case it was contended that there was no debt, and the court say, page 633, "if it incurrs any liability thereby, it must manifestly "mean, either absolutely or contingently, a debt." The same question came again before the same court in *Law* v. *People*, 87 Ill., 386, and it was held that certificates issued to procure temporary loans, created an indebtedness, and the court say, page 393: "The framers of the "article could not have used the term in the sense that the "sum must be due, to be indebtedness, as that is not the "generally received meaning of the word." Page 398: "They (the certificates) propose to bind the city, and if "it was not for the prohibition, the city could be sued on "them and a recovery had, because *they are debts*."

In *Prince* v. *City of Quincy*, 105 Ill., 138, the court reaffirmed its construction, and held that when a municipality shall have reached the limit prescribed, it cannot make "any contract whereby an indebtedness is created." This was an action of assumpsit based upon a special contract with the city, and it was held that the contract created an indebtedness. In another case with same title and in same volume, page 216, the court held that a *con-*

tract creates a debt within the prohibition. In the case of *Mattingly* v. *Wulke*, 2 Brad., (Illinois App. Ct. Rep.,) 169, the court held that the word "indebtedness," when speaking of conveyances in fraud of creditors, "is not "construed to mean a fixed sum due, but any liability "that may have been incurred, either by contract, express "or implied, that renders a party a debtor within the "meaning of the law."

The Constitution of Pennsylvania provides that the *debt* of any city shall never exceed a fixed limit. The City of Erie, after its debt had reached that limit, made a *contract* for the erection of a market house for the use of the city, for which it was to pay the owner a certain rental for a term of years, and in the case of Erie's Appeal, 91 Pa. St., 398, it was held that this *contract created a debt* within the prohibition. In *Wallace* v. *San Jose*, 29 Cal., 180, and *Niles* v. *Niles*, 11 Amer. & Eng. Corp. Cas., 299, it was held that "where the prohibition "against an indebtedness beyond a certain amount is con-"tained in the municipal charter, *contracts raising a* "*liability* upon the performance of some act in the future "are within the prohibition."

In the case of *State* v. *Atlantic City*, decided by the Supreme court of New Jersey on June 15, 1887, and reported in Vol. 9 of the Atlantic Reporter, page 760, the court reviews the decisions of several states upon this question and say, that "all the cases agree in this, "that prohibitions against increasing the indebtedness, "or the debt of a municipality, are not to be construed "as limited to obligations which are debts *eo nomine*, "but are to be extended to all *contracts* for the payment "of money, or contracts whereon the payment of money "may be enforced."

In the case of *Culbertson et al.* v. *City of Fulton et al.*, 127 Ill., 30, it was held that *a debt is created at the date of the execution of a contract*, and in the opinion the court say, p. 36: "By entering into the contract on August "15, 1887, the city 'became indebted.' The obligations "entered into by the terms of the contract constituted "such an indebtedness as is contemplated by the language "of the constitution. It cannot be said that the indebted- "ness did not come into being until the work was com- "pleted and accepted by the city. The city bound itself "to pay for the work when it should be completed, and "could be compelled to do so if the work should be done "according to the contract." The court in this case re-affirmed the doctrine, held in *City of Springfield* v. *Edwards*, *supra*. The paper declared on was executed weeks before there is any claim any fraud was committed, and the debt was created by *it* at its date, and discharged by the proceedings in bankruptcy.

Any other construction of the provisions of this section of the Bankrupt act, would almost entirely defeat the object and purpose of the act, as in the great majority of cases, the parties applying for the benefit of the act, or who are forced into bankruptcy, are actively engaged in business, and all of their indebtedness or liabilities cannot or have not been definitely fixed or determined. The act itself provides for the proving up of contingent claims against the bankrupt's estate; part of section 5,068 being as follows: "In all cases of contingent debts and con- "tingent liabilities contracted by the bankrupt, * * * "the creditor may make claim thereof and have his claim "allowed." Section 5,067 provides for proving up claims for goods, etc., that have been wrongfully taken and converted, etc., and for unliquidated damages, etc.;

and yet, as stated before, the bankrupt, by the terms of the act, is only discharged from *debts*, which was intended to mean and include even contingent liabilities.

That the "debt" sued for in the case at bar was *created* on June 9, 1870, by the contract of that date, is apparent from the fact that if Ames' bankruptcy had occurred after that date and before any delivery, his discharge would have barred the debt or liability.

The evidence wholly failed to sustain the replications, that the debt was created by fraud.

As aforesaid, we claim (and upon the trial made the proper objections, and urged the same in the State Supreme court), that all of the evidence introduced for this purpose was inadmissible, because each and all occurred *after* the creation of the debt, and we will now turn our attention to the subject of "fraud," as meant by the Bankrupt act. The law is now well settled, that the word "fraud" in that act, means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, and this is clearly apparent from its connections with the word embezzlement in this section.

Neal v. *Clark*, 95 U. S. (5th Otto), 704.

Until the law was settled by the United States Supreme court, it was frequently held that a fraudulent conversion by a broker, commission man, agent, or bailee, was such fraud as would prevent his discharge from being a defense.

In the case of *Hunnequin* v. *Clews*, 77 N. Y., 427, which was taken to the United States Supreme court and there affirmed, 111 U. S., 676, the plaintiff brought action for fraudulent conversion of twenty-nine bonds, that

had been delivered by the plaintiff to the defendant as collateral security for a letter of credit; defendant hypothecated the same, and plaintiff having had him arrested, he applied for his release on account of his discharge in bankruptcy, and this was opposed upon the ground that the debt was created by fraud. The court (State), page 429, say: "It is not alleged that there was any false "representations or deceit, nor any device or trick made "or practiced by the defendant, to induce plaintiff to de- "liver the bonds or enter into the arrangement. It was "an ordinary commercial transaction, *entered* into, as far "as appears, in good faith, and the only fraud produced "or alleged, is such only as may be implied by the viola- "tion of the duty resting upon the defendant, under his "contract. We think that the term 'fraud' used in this "statute (referring to this section of the Bankrupt act) "means something more than that. It is used in con- "nection with the word embezzlement, and imports an "intentional and affirmative act. It must be an active, "express fraud, and *not one implied from an unjustifiable "or illegal act*," (and cites *Neal* v. *Clark*, *supra*, to same effect), and on page 430, the court say: "It cannot be "said in this case, that the debt was *created* by fraud." Page 432: "It may be affirmed that in most, if not all, "cases of conversion, some element of fraud, or breach "of duty exists in a greater or less degree, and if all such "cases were intended to be excepted from the operation "of the discharge, the provision would have no force."

In *Palmer* v. *Hussey*, 87 N. Y., 303, the plaintiff got a loan of the defendant, and put up collateral security, and defendant sold same and appropriated the proceeds. The plaintiff sued him, alleging fraudulent conversion, and obtained judgment, and afterwards, the defendant,

having received a discharge in bankruptcy, filed a bill to enjoin the enforcement of the judgment, and the court held the bill good, and say the fraud was only that implied from the breach of duty resting upon him under his contract, and "There was no active, express fraud, but simply one implied from an unjustifiable act. What he "did, was to hypothecate the bonds. That, by itself, was "wrong only in the peril incurred."

Now, if all the evidence was admissible, it only proves or tends to prove, giving it the effect defendants in error claim, that Ames, having no right to dispose of or pledge the highwines before he had paid for them, did so, and then it comes far short of being "fraud" within the meaning of the Bankrupt act. At most, Ames held the goods on deposit, or under bailment, until he should pay for them, for that is the extent of their claim, and if he violated his duty, and pledged the goods, would it be any more a fraud than there was in each of the last two above cases? Would not the fraud be of a similar kind and nature? If these questions are answered in the affirmative, as it seems they must be, that defeats their action, for there is no pretense that there was any other kind of a fraud, than in the disposing of the highwines without having paid for them.

In the replication, it is averred that Ames was insolvent at the time of the delivery, and knowing he was such, and that he had no right to dispose of the highwines until he had paid for them, and fraudulently intending not to pay for them, did dispose of them, etc. There is no evidence of any insolvency on the 18th, the day the goods were delivered, but the evidence is that he was solvent (Abst., 111), but, admitting, for the sake of the argument, that he was insolvent, and that he, after their deliv-

ery, determined not to pay for them, it would not amount to any more or be a different kind of a fraud than in the above cases; and, in fact, would be only a fraud in the attempt to evade payment of a debt already created. There was no more fraud in this case, even if the facts are as Moir & Co. claim, than there is in the concealment of property by any debtor so that it cannot be attached. Suppose Ames had, on the night of the 18th, emptied the contents of these 100 barrels into a vat, with other highwines, for the purpose of rectifying the same, would that have been fraudulent? By reason of their being mingled with other highwines, they could not have been replevied, and would this of itself make the act a fraud?

In *Cronan* v. *Cotting*, 104 Mass., 247, plaintiff had delivered accepted bills of exchange to the defendant, with instructions to collect same, and apply so much of the proceeds as was necessary to pay a debt of the plaintiff to an estate, of which the defendant was administrator. This suit was to recover the balance which defendant had appropriated, and defendant plead his discharge in bankruptcy, and plaintiff replied, fraud.

The court say, p. 247: "The debt in this case arose "exclusively out of a single transaction between the par- "ties. *Its creation* involves no element other than of con- "tract. * * * The only default consisted in the non- "payment of the balance due to the plaintiff after "satisfying the purpose of the pledge. *The debt did not* "*result from, but preceded that default.*" Page 248: "It "is simply a *debt by contract*, like any other which results "from the rightful possession of money that belongs to "another." In the case at bar, there is no evidence that Ames resorted to any trick, or artifice, to obtain the possession of the goods, and the replications do not allege

that there was, but it will be insisted that from his conduct afterward, it must be presumed that at the time he received them, he did not intend to pay for them. At the most, this would be constructive or implied fraud, and not fraud as defined by the United States Supreme court. Even if, at the time of the delivery, Ames had been insolvent, and knew he could not pay for the goods, as Moir & Co. expected, the mere reception of them, without disclosing his insolvency, would not amount to the kind of fraud meant by the Bankrupt Act. In 2 Parsons on Contracts (5th Ed.), 773, it is stated that: "The mere "insolvency of the purchaser, and his utter inability to "pay for goods when purchased, although well known to "himself, will not avoid the sale, if no false representa-"tions or means are used to induce the vendor to part "with his goods." In *Blow* v. *Gage*, 44 Ill., 208, it was held that purchase by a party on a credit, at a time when he knew he could not pay his debts, will not, for that reason alone, be regarded as fraudulent, and certainly an act that will not avoid a sale, will not defeat the operation of a discharge. Another of the acts from which defendants in error will imply fraud, is the giving of the check to Barnes Bros. for $6,000 on the 19th, and after the sheriff had seized his place of business; but Ames had a perfect right to do this, for, as has been repeatedly held by the Supreme court of the State of Illinois, as well as in other states, a debtor in failing circumstances may prefer one creditor to the exclusion of others, if he does so in good faith; and when such a preference is made, it is presumed to be fair and honest.

Wood v. *Clark*, (opinion filed June 17, 1887), 121 Ill., 359.

Schroeder v. *Walsh*, 120 Ill., 403.

Morris v. *Tillson*, 81 Ill., 607.
Bowden v. *Bowden*, 75 Ill., 143.
Mey v. *Gulliman*, 105 Ill., 285.

The evidence of Ames was (Abst., 118, 125), that he justly owed this debt, and more, to Barnes Bros., and there is not one word of evidence to the contrary. This leaves only the act of shipping the goods before they had been paid for, from which any fraud can be presumed, and although such act had nothing to do with the creation of the debt, we will show that such act was perfectly honest, and done in the usual course of business. We submit that the evidence wholly fails, even if all the facts were as claimed by defendants in error, to show any fraud of the nature and kind intended by this section of the Bankrupt act. No act of Ames was fraudulent of itself, no false representation was made, no trick or artifice was practiced to get possession of the goods, and there is not one word of evidence in the whole record of any act of positive, actual fraud, and if all was admissible, and could be carried by relation back to the creation of the debt, at most, there would be only constructive fraud arising from a breach of duty, and this is not sufficient to defeat the operation of the discharge.

We will now discuss the evidence, and show that it wholly failed to sustain the replications of fraud, even if the testimony was admissible, and could relate back to the creation of the debt. The actual facts appear in the testimony of Ames, and there is hardly one word of testimony anywhere to discredit same. Ames, for past eleven years prior to the trial (Abst., 107), had been the treasurer of the Phœnix Distilling Company, at Chicago, and for the years intervening between his suspension, in 1870, and

the organization of that company, he (Abst., 132, 133) was traveling for Dickinson, Leach & Co., a firm engaged in the distilling business at Chicago; previous to the making of the contract with Moir & Co. he had been a member of a firm and firms engaged in the wholesale distilling business, to which he succeeded; he was then, and ever since has been, a member of the Chicago Board of Trade; at the date of this contract (Abst., 110, 111) he was solvent, worth more than $10,000, perhaps twice that, and so continued solvent up to the time of the levy of the execution on the morning of July 19th, the day after the alleged delivery of the highwines; as testified by Maynard, cashier of the bank (Abst., 57), his credit was good at that time, he had the reputation of being a solvent man, a successful business man. Phillips testified (Abst., 161) that he made inquiries and the information was favorable; "never heard, prior to the 19th of July (1870), "anything affecting the credit or standing of Ames"; made these inquiries (Abst., 163) on the 18th of July, of Wallace, Merrill and Lawrence, and the information was favorable to Ames, all considered him good, and they were delivering wines to him.

All of this testimony shows that Ames, previous to and at the time of his suspension, had a good reputation as a business man among business men and members of the board of trade; that he was successful and solvent, and the business connections formed by him within six months after his suspension, and from thence on continously to the present time, all show conclusively that his reputation is a reputable one, and that his suspension or failure was not considered a fraudulent one, and his reputation in the business community was not thereby impaired. His standing and reputation, both then and now,

rebut any presumption of any fraud in a business transaction. This, in connection with his failure to deny under oath the execution of the paper declared on, when it was almost an absolute certainty that if he did so its execution could not be proved, and Moir & Co. would fail in their action, should give great weight to the evidence of Ames; and in considering the question of fraud in this transaction, the rule should be observed and strictly applied, that where two motives, one lawful and the other unlawful, are presented, it will be assumed, in the absence of satisfactory evidence to the contrary, that the lawful motive controlled. Fraud, of the kind and nature intended by the Bankrupt act, means actual, positive fraud, and such fraud cannot exist, without an unlawful intention, and in the case at bar the evidence of an unlawful intention should be of the most satisfactory nature, to overcome the presumption of honesty and fair dealing of a man of the business reputation and standing, then and now sustained by Ames in the business community, and slight evidence or presumptions should not be allowed to destroy his character and reputation — the capital, more than money, to a business man.

Ames details the facts as to this transaction, and as to his mode of conducting his business, which was in accordance with the custom of those in the same line of business, and it is substantially as follows:

In June, 1870 (Abst., 108), he was engaged in the wholesale liquor business on River street, in Chicago, and so had been, either alone or in connection with other firms, for about two years previous; that on the board of trade he made an agreement with Moir to take 200 barrels of wines at $1.07 per gallon; that (Abst., 111) at the time he made this contract he was solvent, worth

more than $10,000, twice that, he presumes; that he continued solvent up to the levy of the execution; that during the same month of June he made other contracts and purchases of highwines, and received other highwines; that during the month of July, up to and including the 18th, he was receiving and delivering out highwines; was (Abst., 111) "doing it right along"; that on the 18th and 19th of July he had more than another hundred barrels on hand (Abst., 111) "the floor was full"; was shipping every few days; that previous to this he had made arrangements with a party in New York to receive consignments and make advances on same (Abst., 112); that just previous to this time he had been in the habit of consigning highwines to this party, making drafts and attaching them to bills of lading, and having them discounted; that he went to New York for the express purpose of making an arrangement to have the wines carried in New York, and not carried here, because he needed money, and the rate of interest was but seven per cent. there, whilst it was ten per cent. here; there was a big saving of cost in having them carried in New York, and east was the market for that kind of goods; there was ten barrels of that class of goods there to one here; there was a little difference also in insurance (Abst., 112); the largest houses here had sent theirs on there, and I followed after their tracks; the largest house here, I knew had several thousand barrels shipped there for that very purpose.

Ames was asked if he knew of instances where goods had been delivered to the buyer and shipped off previous to paying for them, and upon objection being made, the court said (Abst., 113): "If it was the custom "among dealers to purchase goods and have them im-

"immediately shipped east, I think that would throw "some light upon the question of whether he acted "fraudulently, as the plaintiffs claim, in sending off these "goods immediately. He may state it, but I do not "think a single instance is sufficient," and witness answered: "*I know that to be the usual practice.*" Not one witness testifies that such was not the custom and practice, and, on the contrary, he is corroborated in this by Lynch, a witness for the defendants in error, and the one from whom they bought fifty barrels of the high-wines in controversy. Lynch, after testifying (Abst., 37) that he had shipped goods and drawn drafts against them, and that a practice then prevailed, in order to get the advantage of cheap insurance and cheap interest, and to take advantage of any rise in the market, large consignments were made east that year by those engaged in their business, was asked (Abst., 37):

"Q. Wasn't it frequently the case, in your experience, "that the goods you would buy, or persons would buy, "for the purpose of shipping and selling again, would be "directed, not to the place of the buyer, but to the depot "to which they were to go to be consigned abroad?" and answered: "Yes, sir; I often got those instructions." He was further asked: "Q. In this case, were you not "applied to by Phillips & Carmichael to have these very "liquors delivered at some other place, or by Mr. Ames, "to have these very liquors delivered at some other place "than his place? A. If Phillips & Carmichael should "buy these goods from me, *and then I get an order from* "*Mr. Ames* to ship those goods to New York, or any "other place, I should have done so. Q. Would there "have been anything suspicious or unusual in the course "of business to have it done that way? A. No, sir.

"Q. It would save handling the goods twice? A. Yes, "sir."

Ames testified (Abst., 115), that: "At the time I told "them (Phillips & Carmichael), to deliver it all, I said, "'deliver them to the Michigan Central road,'" and on the eve of the 18th, he met Phillips and Carmichael on the street, and (Abst., 114, 115), asked them "why didn't "you deliver them to the Michigan Central road, as I "told you?" which would be a singular question if he was meditating fraud.

No one denies this, and Lynch, witness for Moir & Co., a disinterested one, and a distiller then and now, and familiar with the custom, says that he has frequently delivered goods directly to the depot, and he says further (Abst., 40), that his sales are cash on delivery; always sold highwines for cash, and (Abst., 39, 40) "may not "send the coupon or bill likely for three or four days, or "likely five days." Again (Abst., 38):

"Q. You would send your bills the next morning, as "that was the customary way?

"A. Sometimes I would, and sometimes I would not "—sometimes not for thirty or forty days."

Ames testifies (Abst., 114) that he never, when he sold, sent in his bill the same day he delivered the goods, and he doesn't think he ever had one presented to him the day the goods were delivered. As appears from the testimony of the witnesses in the other cases, and from the testimony of Ames and Lynch, the only witnesses in this case upon that point, the usual custom was to deliver one day, and the bill, with government coupons, the next or some subsequent day, and then they (Abst., 113) were invariably paid for with a check, and,

as Carmichael says (Abst., 155), "those checks are never "certified—have never known them to be certified." The term "cash sales," in this trade, does not mean cash the moment the manual possession of the goods is received—delivery and payment are not concurrent acts—and Carmichael testified (Abst., 72) that a sale on 'change is not a cash sale. He probably meant, as Lynch does, that whilst they are called cash sales, the payment is not to be made until the day after the delivery, or some subsequent day. That the agents of the defendants in error did not expect to receive pay the day the goods were left at Ames' place of business, is clearly apparent from their testimony, for we find Phillips, who attended to the delivery (Abst., 163), making inquiries on the 18th, of several members on 'change, as to the solvency of Ames, and the report was favorable, and it is preposterous to suppose that business men would be making inquiries as to the solvency of a purchaser, if they expected the cash before they parted with the goods; and, as Carmichael testifies (Abst., 62), "we supposed him "to be solvent." Besides, Moir & Co.'s agents could not personally collect of Ames, for they had instructed (Abst., 38, 64) Conklin and Lynch to collect at Moir's price when they delivered, and those parties would have to furnish the government coupons, and Lynch says (Abst., 40) that he was not instructed to collect the cash immediately on the delivery. The conclusion is irresistible, that these highwines were delivered according to the custom without any expectation of receiving payment on delivery, or before the title passed, and that, as soon as the goods came into Ames' place, he had a right to do whatever he pleased with them, and that his consignment of them was no badge of fraud.

The only fraud claimed by the defendants in error, is the fact that Ames shipped the goods before he had paid for them, and that was the only act developed in the former suits, as showing, or tending to show fraud. This claim is a shallow one, for their agents did just that thing themselves in the sale to Shufeldt, and they, Moir & Co., ratified it by demanding, and then suing for the money obtained from Shufeldt. Phillips testified (Abst., 75) that "the highwines had already been delivered to Shu- "feldt when they were paid for," that is, Phillips & Carmichael, before they had paid Conklin, had recovered them by replevin, and sold and delivered them to Shufeldt & Co., and (Abst., 75, 76) bill of Phillips & Carmichael was not sent to Schufeldt & Co. until after the wines had been delivered—don't remember when book-keeper went with the bill. There was no fraud in this, nor was there in the Ames consignment, and the cry of fraud was made in the replevin suits solely to save the goods, and there does not seem to have been any issue made in that case, as to whether there was any fraud in fact or not, and it was assumed that he had acted fraudulently, and any reflections derogatory to Ames, occurring in the opinion of the Supreme court, in the cases in the 60th and 69th Ill., must not be taken to his prejudice, in view of the fact that he was not a party or represented in those cases, and had no opportunity to disprove the charges of fraud. In the case at bar, the fact of this shipment before payment, is the only one upon which defendants in error rest the claim of fraud; for if he had a right to ship, the fact that he discounted drafts upon such shipment cuts no figure. It must be borne in mind that the witnesses, in giving dates, are governed entirely by what they appear to be in transcripts, and whilst in some places

these show that one bill of lading was dated the 18th, in other places both bills appear (Abst., 161) to have been dated the 19th, and Ames swears positively (Abst., 115, 116) that none of these 100 barrels left his store before 7 o'clock A. M. of the 19th, and Lynch says (Abst., 38, 39) that at about half past 9 o'clock A. M. of the 19th, he sent his clerk to Ames' place to collect the bill for fifty barrels, and that this clerk, when he returned, reported that Lynch's fifty barrels were still there, and yet it seems that the Lynch wines were the ones that went off to Detroit.

Carmichael testified (Abst., 62) that he and Phillips went to Ames' place about 9 o'clock on the 19th "to "tender these wines," and being asked (Abst., 67) if the wines were *then* in Ames' store, answered, "Well, I "didn't see the wines there. I think the wines were not "there when I went there."

There is nothing in the claim or assertion that any of these goods were shipped on the 18th, or were taken out during that night. The railroad company (Abst., 115) would not receive goods before 7 A. M., nor after 6 P. M. There was plenty of time in the morning after 7 A. M. of the 19th, to have sent several hundred barrels away before Phillips & Carmichael, or either of them, went there, for it was (Abst., 116) not more than five minutes' drive from Ames' place to the depot.

Ames testifies that he gave orders on the 18th to ship two car-loads the next morning, and (Abst., 123, 124) "did not tell him which ones to ship—had there twice "that amount any way," and Carmichael testified (Abst., 63) that on the morning of the 19th he "saw lots of wine "there;" "the floor of the store was covered with wines "as thick as you could roll the barrels together." Ames

testified (Abst., 124) that when he went to the bank with the bills of lading and drafts, he did not know that the 100 barrels so shipped were the ones delivered on the Moir contract, and says that the reason these happened to be those, instead of others, was because they were the last received the night before, and hence were the nearest the door, and the handiest to get at, and (Abst., 124) that "the balance that was in there was to go. My arrangement with the eastern parties was to take all I had to go, which was a thousand barrels or more behind yet." By this he means that he had, including those on hand and those contracted, more than a thousand barrels yet to go. He "had (Abst., 120) on that day "150,000 gallons that was bought on speculation, believing that the tax was going on," and as aforestated (Abst., 116, 117), he had some time previously made arrangements with the bank to discount his drafts with bills of lading attached, and had been doing this right along, and Lynch, the distiller, testified that this was common in their trade; that he had done it himself; and Maynard, the cashier, corroborates this custom. There was nothing, therefore, unusual or suspicious in the fact of making shipments in this way, and having drafts discounted. The only thing, then, from which fraud can be inferred, is the fact that shipment was made without having paid for the wines. It is apparent from the testimony of Ames, and also of Lynch, witness for defendants in error, and a distiller and member of the board of trade, and not a witness testified to the contrary, even by implication, that purchasers have absolute control from moment of the manual delivery over goods sold and delivered, upon what were on "'Change" called and considered "cash sales," for Lynch always (Abst., 40) sold highwines for cash—

never on credit (Abst., 38), never sent a bill with the team as long as he had been in business. (Abst., 38.) "Might not send the bill for three or four days or a "week," (Abst., 40), sometimes not for thirty or forty days, and (Abst., 37) frequently delivered the wines at the depot. Now, it is absurd to say that, under the circumstances narrated by Lynch as above, the purchasers had no control over such wines until Lynch found it convenient to send in his bill and government voucher, and yet Lynch's sales were *always* cash sales, and he testifies (Abst., 37) he always endeavored to comply with the custom of business in this city. Ames did nothing out of the usual custom, and there is not the slightest evidence at all in the record, from which there is a fair presumption of fraud. Ames testifies (Abst., 120) that he offered to cancel the contract and forfeit the whole of his $600 margin, and Carmichael refused to do it; the wines were forced upon him, unless he settled upon the terms proposed by Carmichael, and he preferred to carry the goods himself, in hopes that a fluctuating market might bring some relief, and, as Ames testifies (Abst., 117), wines were carried in New York "for months after that." Carmichael, in one of the previous suits, testified that Ames said at the time he made the call on the 15th, that he wanted the 100 barrels for distilling purposes, and this is (Abst., 121), expressly denied by Ames. Moir & Co.'s agents knew that Ames was buying and shipping, for Carmichael in answer to the question (Abst., 62), if he knew anything in regard to Ames' receipts and shipments of other highwines at about that time, answered, "Yes, we know that he shipped," and it is a fair presumption that both the defendants in error and their agents, knew that Ames had entered into a speculation,

based upon the expected increase of the government tax, and we even find that the defendants in error themselves had expected, or at least feared, as early as July 1st, that there would be such an increase, as they at that date (Abst., 96), "had paid the government tax on 200 barrels of these wines, in anticipation of meeting Mr. "Ames' contract," and they, as good business men, would not otherwise have done this—would not have paid the tax—until there was a call, or they desired to avail themselves of the privilege of delivery. Ames testified (Abst., 125), that the amount of the two drafts was $500 or so less than the market value of the highwines, and now, if Ames had intended to defraud Moir & Co., he could readily have sold the highwines here, avoided any danger of stoppage in transit, and have made at least $500 by the transaction. Ames testified (Abst., 124), that when he shipped these highwines, he had no intention of defrauding Moir & Co., nor when he got the drafts cashed, and all his acts show that he had no such intention, for we find him paying (Abst., 35) Lynch $1,500 or $2,000 at just about this time (Lynch doesn't remember whether it was before or after the suspension) in settlement of a similar contract, and Ames testified (Abst, 119) that at that time he had a standing arrangement by which he could get money from the East when he wanted it, and as quick as he made settlement with his crediters, they furnished him with nearly $50,000. Ames testifies that he was in the habit of giving judgment notes, and always met them (Abst., 127); that the judgment note was given May 1st, previous to that, when he bought out his partner, that he received its full value, and this is not disputed by the defendants in error, nor is it disputed that the check given to Barnes Bros. on the

19th was in part payment of a previous indebtedness to them, and Ames testifies in regard to this that one of the Barnes Bros. was here (Abst., 118), and when he learned that the sheriff had seized and closed Ames' place of business, he demanded payment, and this check for $6,000 was given, and as Barnes was a stranger here he went to the bank and identified him, and as Bell, the teller, testifies (Abst., 53), this is quite common and not at all a suspicious circumstance. Ames testifies (Abst., 119) that he gave this check to Barnes Bros. in good faith, and that he believed that he had a right to prefer any creditor, and that (Abst., 124, 125), even after the giving and payment of this check, he could have paid Moir & Co.'s bill, that the bank had often honored overdrafts, and would never have thrown out a check for $5,000. An overdraft for a few thousand dollars was never spoken of; that without funds or securities, the bank was in the habit of paying checks for a few thousand dollars. As a matter of fact, and as Ames testifies, and no one disputes it, *he was never asked by any one* to pay the price of these highwines; and, although counsel for Moir & Co. in the cross-examination tried to confuse Ames as to his whereabouts after his suspension, probably for the purpose of showing he could not be found so as to be asked for payment, but it appears, as testified by one of the defendants in error (Abst., 80, 81,) that no claim was made against Ames, and no charge against him for these highwines was made upon the books of their firm; and Ames said (Abst., 132) he saw Phillips & Carmichael frequently within the next six months, and again (Abst., 121), that he met Carmichael within a week or two, or perhaps a month, and yet no one duns him, and no cry of fraud is made by

any one, as far as appears in the record, except indirectly on the trial of the replevin suit, which Ames had no opportunity to refute, as his absence therefrom, and defense thereto, had been procured by the agents of the defendants in error, and also by the bank.

If Ames had been guilty of fraud, as now claimed, why did not Moir, and Phillips & Carmichael, or one of them, cause him to be arraigned before the Board of Trade, of which they were all members? How frequently do we hear, when a "corner" has collapsed, or a failure has occurred, of hearings and trials before the board for fraud? Is it fair to suppose that Ames, if he intended to defraud, when he had numerous like contracts, would not have attempted to defraud others than the defendants in error? These contracts are made on the board, and among its members, and if he had attempted to or had succeeded in defrauding any one, including Moir & Co., he would have been brought before the board and expelled if guilty.

Phillips testified in the former cases that neither Ames, nor his book-keeper, could be found at his place of business on the 18th, so as to make a tender of the goods, and Phillips and Carmichael testified that they were not there on the morning of the 19th, and that a laborer, the only one there, said Ames' wife had gone east a few days before, and Ames was boarding, but he did not know where; that Ames hadn't been there that morning, and the book-keeper had gone a-fishing (this statement, when first offered, about what this man knew, was stricken out, but the jury heard it, and in another place, by oversight, it was allowed to be read without objection), and all this was read in evidence in this case, for the purpose of showing that Ames and his book-keeper were purposely

keeping out of the way of the agents of Moir & Co. on both days.

Both Ames and his book-keeper testify, that they were both there as usual on the 18th. Now, why Ames or his book-keeper should conceal themselves on the 18th, even if there was a scheme to defraud, it is hard to conceive, for under no circumstances, according to the custom, could payment have been asked for on that day, and according to the testimony, neither Phillips nor Carmichael could have demanded pay even during the forenoon of the 19th, for they never had the government papers until after the sale to Shufeldt & Co. This laborer did not try, on the morning of the 19th, to conceal the whereabouts of the wines, for he told to what depot they had been taken. Ames testifies (Abst., 114) that his wife went east in January previous, and was taken sick there, and remained there until after this transaction; that he, at that time, had never kept house, and had always boarded; that on the 18th he was at his place of business the same as he was every day—was there the greater part of the day (Abst., 114), left just about as the last wagon drove up, which was about 6 P. M., and had started toward South Water street on River, and there met Phillips and Carmichael in a buggy, and had a talk with them (Abst., 114, 115); that he went there the next morning at the usual time, about 8 o'clock, and after the bills of lading had been procured and drafts drawn, he took them to the bank (Abst., 116, 117); did not leave his store "until after 9 o'clock "anyway," and was not the bank until it opened, which was 10 o'clock, and Bell, the teller, (Abst., 50) says this discount of the drafts was "shortly after the bank opened for business, which was 10 o'clock," and that at the time

of his former deposition, he looked the matter up in the books, and this refutes the statement of Goudy, in this case, that on the previous trial, they claimed fraud because he was at the bank as early as half-past eight. Kendall, the book-keeper, testifies (Abst., 139) that he usually got to their place of business in July, 1870, between 7 and 8 o'clock, and staid, as a general thing, until 6 o'clock, sometimes later, staid until he got his work done. After his recollection is refreshed by telling him that the 18th was the day before the sheriff took possession, he says (Abst., 140): "I was there that day; I am very sure;" he cannot remember as to any particular lot of highwines as delivered that day, but he says (Abst., 140), "wines were coming in and going out there all the time, think "they were receiving wines there every day, we would "sell some, ship some, and so on. We were doing a "general business." (Abst., 141.) He was there at usual time on the morning of the 19th, the boys were there, Ames was there; he always prepared the bank account and made the drafts, etc., unless he was sick. I prepared it every morning (Abst., 142) should say that I saw Phillips or Carmichael there on the 18th; the usual force of employes were there that day—we were doing business as usual—there was nothing there that day that was unusual; had no intimation that the sheriff would levy, "heard nothing of the kind, and I suspected nothing "of the kind." This witness, Kendall, testified (Abst., 143) that he had been a stockholder of the Phœnix Distilling Company since 1876, and been also secretary of that company for past four or five years, which shows that he is a reputable business man, and one occupying a position of trust. Of course, at this late date, it is utterly impossible for any one to detail all his actions on any cer-

tain day, and this is the reason of the statute of limitations, but persons who are qualified to occupy positions of trust and transact business, would be pretty apt to remember any unusual, particular fact, of much importonce, such as any act or acts of one's employer that would indicate or excite suspicion of a failure or suspension of business, and especially would this be so of a book-keeper, who was trusted sufficiently to prepare the bank account, draw drafts, etc., and Kendall, the book-keeper of Ames, testified that they were transacting business as usual, and he had no suspicion of any levy. As a matter of fact, it would be almost an impossibility for a business man, with a book-keeper, trusted as Kendall was, to concoct a scheme to defraud his creditors, and take any steps to carry it out, without its being known, certainly suspicioned, by such book-keeper. Not a witness, except the dead ones, and they only by inference, impugn the honesty and integrity of Ames, and such inference has been wholly dispelled by the testimony offered on the part of the plaintiff in error. It does not seem possible that any one after reading this record all through, can say there is any evidence of fraud; certainly not of the active positive fraud, intended by the Bankrupt Act.

The issue of fraud raised by the replications, and which the court erroneously, as we claim, told the jury was the only issue to be tried, was one, which it is obvious, must be proved and resisted mainly, if not entirely, by oral evidence. Such is the character of the evidence which Moir & Co. offered, and that evidence was taken more than fifteen years ago, and in causes to which Ames was not a party, and had no opportunity of cross-examination; and the situation as to this issue, is this: defendants in error, more than fifteen years, before the

commencement of this, their suit, had full knowledge of what they now claim show fraud, and that the evidence on their part was preserved by bills of exceptions, and that they were in a position where they were secure; where neither the decay of memory, nor forgetfulness, nor the death of witnesses could harm them, and there they rest, until nearly sixteen years have expired, and until Phillips and Carmichael are both dead, and then they commence this suit, and use the evidence of those dead witnesses, and claim that same was given when the facts were fresh and clear, and should therefore, have far more weight than the testimony of Ames, and his book-keeper, who testify at this late date, solely from their memory, and hence cannot, they will claim, be entitled to much weight. This conduct on the part of Moir & Co., makes Ames bear all the injurious consequences of this great delay. General experience has shown that, in controversies which must be settled by oral testimony, it is almost impossible, in the great majority of cases, after a very few years subsequent to the transaction, to ascertain what the truth is, and in Illinois the period is fixed at five years in which actions, resting upon such testimony, must be commenced, and this period has been fixed, because it was the judgment of our law-makers, that a longer one would be sufficient to obliterate all recollection of the transaction to be investigated, and make it impossible to ascertain the truth with certainty; and this law of limitation rests on considerations of sound policy, and was established in the interest of peace, and to promote the welfare of society. In this case, we cannot plead the bar of limitations to the issue of fraud, but no reason, except a strict rule of law, can be given why Moir & Co. should not be barred from

raising that issue by a replication, by the time limited by statute for bringing an action based upon fraud. If Moir & Co. choose to sleep on their rights, if any they ever had, for nearly sixteen years, they should suffer the consequences of such delay—and, if not now debarred from raising that issue, they should be compelled to establish the same, not merely by a preponderance, but by clear and satisfactory evidence, and not permitted to avail themselves of any weakness or defect in the defense, if there should be any. We ask the court to consider this long delay in its examination of the evidence upon this issue of fraud, and to strictly apply the rule, that the burden of proof is upon the defendants in error, and they must make out a clear case of fraud, and not one of inference merely, unless the inference of fraud is irresistible.

Is this court willing, upon such evidence, produced after the lapse of more than fifteen years, to fix a life-long brand of intentional fraud, involving moral turpitude, upon a reputable citizen and business man, of the standing shown to have been enjoyed by Ames, in Chicago, for more than twenty years?

We have already cited cases that decide what is meant by the word "fraud" in the Bankrupt act.

Neal v. *Clark*, 95 U. S., 704.

Cooley, in his work on Torts (Ed. of 1879) states that, page 476, "In general, mere silence, a mere failure to "apprise the party with whom one is dealing, of facts "important for him to know for the protection of his "interest in the particular transaction, is no fraud." Page 477: "Therefore, if one who is insolvent, buys "goods of another without disclosing his circumstances

"to his vendor, who is ignorant of them, but makes no "inquiries, and is not deceived by misrepresentation or "artifice, there is in law no fraud."

It is stated in Bump on Fraud. Con. (3d Ed.), page 19, that "there can be no fraud without a dishonest intent." And page 20: "The term fraud imports something of a "more vicious character than the mere production of a "delay of satisfaction."

Although it is alleged in this replication of fraud, that Ames was insolvent, etc., yet it was proven that he was solvent, both (Abst., 111) at the time of the date of the alleged contract, and until after the day of the alleged delivery, but for the sake of argument, admit that he was insolvent at the date of the delivery, and then, even if what transpired after the creation of the debt was admissible, and treating all the evidence of fraud produced to sustain the claim of the defendants in error as entirely uncontradicted, we confidently assert that it falls far short of proving active or positive fraud as defined by Cooley, *supra*. Would there have been any fraud in the transaction, if Ames, after the consignment and the discount of the drafts, had on his return to his office given the agents of Moir & Co. a check, and before its presentation his bank account had been attached by Barnes Bros., or any other creditor? Certainly not, for the result can not make an honest act a fraudulent one. If the execution had not been levied, nor the goods replevied, the claim of Moir & Co. would have been paid, whenever the bill was presented, and even after the levy, if there had been no replevy, and their bill had been presented, we have a right to say, it would have been paid, for Ames testifies that after giving this check to Barnes Bros., he was able to pay it, had whiskies, etc., on hand on which he could

have immediately realized more than sufficient to pay their claim, and also had arrangements by which he could get all the money he wanted, and did get nearly $50,000; and besides, if there had not been any replevin, the dratts would have been paid. This levy, as he testifies, destroyed his credit for the time being, and upon this and the replevin of the goods, which prevented the payment of his drafts, he concludes to halt and see how he stands. That is all there is of this transaction; it was a common commercial one, carried on from first to last in the usual mode of business in his line, without any intention to defraud any one, and the position he has almost ever since occupied, and his business connections, all show that the business community impugn no fraud to him for his suspension in 1870. He entered into a speculation, and it was known that he was caught on the wrong side of the deal, and had a heavy load to carry, and his former partner having his judgment note, and fearing that he could not carry it, concluded (Abst., 120) to secure himself, and this, instead of any fraud of Ames, caused the agents of Moir & Co. to commence the replevin suits, to save their principals, and after this it was utterly impossible for Ames to continue in business until he could make a settlement, for this levy and replevin would and did necessarily cause other creditors to act likewise. That Phillips & Carmichael were fully empowered by Moir & Co. to commence these replevin suits, if necessary for the protection of the latter's interests, fully appears from the testimony of Moir himself, (Abst., 95) and they afterwards ratified their action in so doing by suing such agents for the proceeds of the wines so replevied, (Rec., 304, 305) in an action of *indebitatus assumpsit*, in which the Supreme court of Illinois held, that

Moir & Co. were bound by the result of said replevin suits commenced by their agents, (*Phillips* v. *Moir*, 69 Ill., 155.) In all probability, there is not a merchant in Chicago to-day who could at once meet and pay all his liabilities, if called upon to do so, and yet they are solvent, and non-payment of any claim would be no evidence of even constructive fraud. In the case of *Hide & Leather National Bank* v. *West*, 20 Brad., (Ill. App. Ct. Rep.), 61, it appears that at about noon on August 8th, plaintiffs on the board of trade sold to D. & Co., also members of the board, 5,000 bushels of corn at an agreed price, *for cash*, the transaction to be closed before 3 P. M., of that day. The sale was accordingly closed by D. & Co. making and delivering to plaintiffs their two checks upon the defendant bank (where D. & Co. kept an account), payable to plaintiff's order, and at the same time plaintiffs delivered to D. & Co. the two warehouse receips for the corn. Near the close of banking hours, *on the same day*, D. & Co. took the receipts to the defendant bank, and their account being overdrawn, they made a draft upon New York for $2,300, attached the warehouse receipts thereto as collaterals, and delivered the whole to the bank, and obtained credit for the $2,300, and thereby secured their overdraft to nearly this amount.

Plaintiffs deposited the checks they had received in their own bank, and the next day when the checks were sent through the clearing house, D. & Co. had failed and the checks were not paid.

Plaintiffs brought trover against the bank to recover the value of the warehouse receipts, and the court held that the bank was an innocent party, and its lien good.

In this case Dickinson & Co. gave the bank these warehouse receipts as security for overdrafts—in other

words, paid another creditor with the proceeds of the corn, this $2,300 draft being within a few dollars ($32.34) of the full purchase price of the corn. That case is "on "all fours" with the present one. Therein the court hold and say: "The case is totally barren of any evi- "dence tending to show that Dickinson & Co. made any "false representations to the plaintiffs, or resorted to any "trick or artifice *at the time* of the purchase. It is true, "the evidence shows they were insolvent the next day, "and might have been so at the time of the purchase. "That mere fact, however, is not sufficient for the basis "of a charge of fraud in the purchase." In the present case, there is not one word of evidence, or in fact any claim made, that Ames made any false representation at any time, nor that he resorted to any trick or artifice to induce Moir & Co. to enter into any contract, or to part with the physical possession of the highwines, and hence we say as the court virtually said in the last above case, "the case is totally barren of any evidence tending to "show" that Ames committed any fraud in the purchase of the highwines, or in the subsequent disposal of them as he did, and the "mere fact" that he became insolvent the next day "is not sufficient for the basis of a charge "of fraud in the purchase," or creation of a debt, and hence the judgment was contrary to the law and the evidence.

On the issue concerning bankruptcy, the Supreme court of Illinois only cites in support of its opinion thereon (Abst., 188) one case, viz:

Darling v. *Woodward*, 54 Vt., 101.

This case has been in effect overruled by the United States Supreme court, as will now appear:

In the subsequent case of *Hammond* v. *Noble*, 57 Vt., 193, the same question was at issue as in the case of *Darling* v. *Woodward*, *supra*, and on page 201 the State court say: "Standing in the same relation to the money, "which the defendants in *Johnson* v. *Woeden*, and in "*Darling* v. *Woodward*, *supra*, did to the oxen and sheep, "he like them, wrongfully and intentionally used the "property intrusted to him, to the detriment and loss of "the plaintiffs. In principle, the case at bar cannot be "distinguished from the cases just cited. The decisions "in those cases control the decisions in this case." The court in its opinion cites the case of *Neal* v. *Clark*, 95 U. S., 704, and *Hunnequin* v. *Clews*, 111 U. S., 676, (cited by us herein), defining what is fraud in the creation of a debt, and then decides contrary to the rule there announced, and say that its position taken in the prior cases is the correct one. This last case was taken to the Supreme court of the United States (*Noble* v. *Hammond*, 129 U. S., 65), and there reversed. In this case last cited, it appears that Hammond asked Noble to collect some money for him, and to keep same until he called for it. Noble, during the same month collected the money, and deposited it to his own credit, with his own funds. During same month Noble failed, and was soon thereafter adjudged a bankrupt. Hammond sued Noble for this money, and he gave notice under the statute of discharge in bankruptcy. Plaintiff recovered, and judgment was affirmed on appeal to the State Supreme court. The only issue in the Federal court was as to whether the debt was created by fraud, and on page 69 the court say: "This provision does not apply to a *debt created* by pur- "chasing in good faith from an executor, bonds belong- "ing to his decedent's estate at a discount, although

"such act was held to be a constructive fraud. *Neal* v. "*Clark, supra.* Nor does it include such fraud as the law "implies from the purchase of property from a debtor, "with intent thereby to hinder and delay creditors in the "collection of their debts. *Wolf* v. *Stix, supra* (99 U. "S., 1). Nor does it refer to a debt arising from "the conversion by a party to his own use of bonds held "by him merely as a collateral security for the payment "of a debt, or the performance of a duty, and which he "fails to restore after the payment of the debt, or per-"formance of the duty, to the person who entrusted them "to his keeping. (*Hunnequin* v. *Clews, supra.*) In all "these cases the defendant was held to be released by the "subsequent discharge in bankruptcy." The court, on page 70, further says: "Nor can the subsequent ming-"ling by the plaintiff in error of the money collected "with his own constitute the *actual, positive* fraud con-"templated by that act, but only such an implied fraud as "is involved in most or all cases of conversion of prop-"erty, or of breach of contract." And the court say that "the judgment of the Supreme court of Vermont is "in conflict with the principles laid down by the decisions "of this court," and same is reversed. and if the case of *Darling* v. *Woodward*, 54 *ib.*, 101, cited by the Supreme court of the State of Illinois, had been taken to the United States Supreme court, it would have met with a like fate.

The Supreme court of Illinois, in its opinion, did not cite the only other case relied upon by counsel of defendants in error upon this issue, viz: *Claassen* v. *Schœneman*, 80 Ill., 305.

The Illinois case was decided in 1875, three years before the decision in the case of *Neal* v. *Clarke*, 95 U. S. (5th Otto), 704, and which was, as appears from the

opinion, the first case in the United States Supreme court defining what is meant by the term "fraud" in said act, and the failure of the State Supreme court to refer to *Claassen* v. *Schœneman*, *supra*, is significant of the court's opinion, that it was inapplicable or unsound in law.

II.

THE SUPREME COURT OF THE STATE OF ILLINOIS ERRED, IN DECIDING THAT THE SUPERIOR COURT OF COOK COUNTY, IN SAID STATE, DID NOT ERR IN ADMITTING UPON THE TRIAL THE EVIDENCE ADMITTED BY SAID COURT TO SUSTAIN THE REPLICATIONS TO THE PLEAS OF DISCHARGE IN BANKRUPTCY.

The evidence objected to, which was *all* that was introduced upon the trial in support of the replications that the debt sued for was created by fraud, was of and concerning matters that occurred on July 18th and 19th, 1870, nearly six weeks after the creation of the debt by the contract sued upon. The grounds of objection to such evidence, urged at the trial by Ames' counsel and also in the State Supreme court, will be found on page 30 of the abstract. These objections seem to be fully supported by the authorities cited, *supra*.

III.

THE SUPREME COURT OF ILLINOIS ERRED, IN SUSTAINING THE RULINGS OF THE LOWER COURTS IN RESPECT TO THE GIVING AND REFUSAL OF INSTRUCTIONS RELATING TO THE BANKRUPTCY ISSUE.

(*a.*) Instructions given for defendants in error.

The second instruction given for Moir & Co. (Abst.,

165, 166) was, we submit, clearly erroneous, as it substantially tells the jury that if Ames disposed of the high-wines after they had been delivered into his possession, with the expectation that pay for same would be made simultaneously, such an act would be competent evidence to be considered by the jury, in connection with all the other evidence, in determining the question whether Ames "was guilty of fraud or the debt sued for is barred "by the discharge in bankruptcy."

The fourth instruction given for Moir & Co. (Abst., 166), was also erroneous, for upon a like statement of facts, substantially, it told the jury that they "would have "the right to find that a debt created by such act was "created by the fraud of the buyer, and consequently that "such debt would not be barred by a discharge in bank-"ruptcy."

The trial court of its own motion added the following to said fourth instruction, viz: "It is for the jury to say, "however, from all the evidence, whether the defendant "in this case was in fact guilty of actual fraud in pledg-"ing the property in question without having paid for the "same, in the manner shown by the evidence."

We submit that this instruction virtually instructed the jury that the disposal of goods without having paid for same, was fraudulent, and was such fraud in the creation of the debt as would bar a discharge in bankruptcy.

It told the jury that such an act created the debt, the language being (Abst., 166), "the jury would have the "right to find that a *debt created by such act*" (disposal of the goods)," was created by the fraud of the buyer." The court in its addition as above to said instruction, told the jury that it was for them to say from all the evidence,

whether Ames "was in fact guilty of actual fraud (not "in the *creation* of the debt, but), in *pledging* the prop- "erty."

The seventh instruction given for Moir & Co. (Abst., 186, 187) was that, if the jury found "from the evidence "that the debt sued for was created by the fraud of the "defendant in the manner and form as stated in the rep- "lications of the plaintiffs to defendant's pleas setting up "the discharge in bankruptcy, then such discharge in "bankruptcy set up in said pleas, would constitute no de- "fense in this action." The only replication giving details is the third. (Abst., 10, 11, 12.) An analysis of the averments of this replication fails to disclose any fraud whatever, either in the making of the contract (whereby as we claim the debt was created), or in obtaining possession of the highwines. The replication down to the middle of page 11 of the abstract, shows a complete delivery, without one act of Ames for the procurement of it. The entire remainder of the replication, simply charges Ames with acts of alleged fraud, relating, not to the obtaining possession of the property, but to the pledging and disposing of the same.

The replication winds up with inferences of the pleader, (Abst., 12), and with the averment, "and so the plaint- "iffs in fact say that said debt in the declaration men- "tioned and sought to be recovered in this suit, was cre- "ated by the fraud of the defendant, and is * * * "excepted from the said supposed discharge in bank- "ruptcy in said pleas mentioned." According to the said seventh instruction (Abst., 166, 167) already referred to, the discharge in bankruptcy was no defense if this replication was proved. But the logic of the replication is that the debt was created, not by the contract of

June 9, 1870, declared upon, nor by the obtaining the possession of the goods, but by the disposal of the same. We respectfully submit that each and all of the aforesaid instructions are contrary to and violate the principles announced and applied by this court, as well as other courts, as to what is "fraud" in the creation of a debt within the meaning of the Bankrupt Act.

(*b.*) The instruction given by the trial court of its own motion, (Abst., 172, 173), was even more erroneous than the others heretofore considered. Instead of enlightening the jury as what constituted fraud in the creation of the debt, it submitted to them an entirely different issue, viz: whether there was fraud or not "in taking possession of the property and disposing of the same," and this the court told the jury "is the principal question for "you to determine in making up your verdict."

Further comment is unnecessary.

(*c.*) Refusal of instructions asked by plaintiff in error.

That the trial court erred in refusing the instructions so asked for, and the Appellate court, and the Supreme court of Illinois, erred, in sustaining the trial court in such refusal, as to each and every instruction so refused, will appear by the reading of the same (Abst., 168–172), in connection with the law and evidence hereinbefore presented. Each and every of such instructions was based upon evidence in the case, and should have been given, if the law is as announced in the authorities hereinbefore cited.

In conclusion we state, as this court is undoubtedly aware, that State courts are not favorably inclined towards a liberal construction or application of the bank-

rupt act, and instead of giving same a beneficial effect, as was intended, apply the strict rules applicable to a penal statute, and apparently do all they can to deprive a defendant of the benefit of his discharge. In the case at bar this purpose was very evident, as an examination of the record will show, but same are not incorporated in the abstract, as such matters are not before this court; but yet, on account of same, this court should not be unfavorably impressed by the fact that the plaintiff in error has been defeated in the State courts.

The trial judge and jury chose to see but one fact in the case, viz: that Ames disposed of the highwines, and never paid for them. This was apparently fraud enough, in their opinion, to justify the verdict and the judgment. The plea of discharge in bankruptcy seems to have been regarded as an aggravation of the supposed fraud, both judge and jury ignoring their duty to administer and apply the bankrupt law, which gives the bankrupt in every case, free from fraud, within the meaning of the act, the benefit of his discharge, because of his inability to pay his debts.

The instructions of the court told the jury, substantially, that the disposal of the goods without paying for them, constituted in law a fraud, and was moreover a fraud in the creation of the debt. Both of these propositions were sustained by the Supreme court of Illinois, and we submit that they, and each of them, are erroneous.

Respectfully submitted.

JOHN G. REID,
WILLIAM H. BARNUM,
Attys. for Pltf. in Error.

Office Supreme Court U. S.
FILED,
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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 1404.

WILSON AMES,
Plaintiff in Error,
vs.
ROBERT MOIR, JOHN C. NICOL AND JAMES PETERSON, LATE PARTNERS AS ROBERT MOIR & COMPANY,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN G. REID AND
WILLIAM H. BARNUM,
ATTORNEYS FOR PLAINTIFF IN ERROR.

IN THE

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REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Two important questions are here, demanding solution. The *first* is, what is the debt sued for? And the *second*, was that debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer or while acting in a fiduciary character within the meaning of the Bankrupt Act?

The declaration in both counts avers as the cause of action that the plaintiffs *delivered to the defendant*, under a writing or agreement set forth, one hundred barrels of high-wines which said high-wines *were then and there accepted* and received by said defendant under said writing or agreement. (Rec., 4, 5.) And both counts further aver that *upon the delivery* of said high-wines

to the defendant it became and was his duty then and there to pay to the plaintiffs the said price and value of said high-wines, etc. The replications Rec., 10, 11) are not open to the charge of *departure* as counsel would have it, but go upon the same cause of action averred in the declaration "because they say (in the sec- "ond replication) that the *said debt in the plaintiffs' dec- "laration mentioned* and sought to be recovered, was cre- "ated by the fraud of the defendant," and (in the third rep- "lication) "that the said high-wines *so sold and delivered by "plaintiffs to defendant as stated in the declaration*, were so "sold and delivered not upon credit but for cash," etc. Further on in said replication (Rec., 11) it is averred "that such delivery was not completed until * * * "six o'clock in the afternoon of that day" (July 18, 1870): and then after divers other averments the concluding one is "and so the plaintiffs in fact say that *said debt in the "declaration mentioned and sought to be recovered in this "suit* was created by the fraud of said defendant," etc.

It thus appears that neither the declaration nor the replication proceeds as for goods *bargained and sold*, but for *goods sold, delivered and accepted*, and pray judgment accordingly. The covenants of the third replication (Rec., 11) as to the defendant's removal and disposal of the goods are, therefore, simply averments of what the defendant did with high-wines sold and delivered to and *accepted* by him, and which were consequently his own high-wines. How, then, could Ames embezzle his own high-wines? And even if, according to the third replication, he did remove and dispose of the goods with the fraudulent intent of not paying for them, he would only have removed and disposed of his own goods, not the goods of the plaintiffs, for, according to the replications and the declaration, the sale and delivery had been "completed."

The argument of this case cannot proceed upon the theory of counsel, that the debt or claim sued for, is the same it would have been had the action been for goods bargained and sold, but not delivered. The latter sort of an action would have been at least consistent with the theory that in removing and disposing of the goods Ames was violating and invading possessory rights of the plaintiffs in the goods, and doing so fraudulently; but the averments of the declaration and replications in *this* case, where the action is for the price of goods sold, delivered and accepted, leave no room for the argument that the plaintiffs had any possessory rights remaining, upon which Ames could possibly commit either fraud or embezzlement.

Moreover, besides the averments in both replications and declaration, showing that Ames *owned* the high-wines, sold and delivered to him, the third replication fails to aver that the wines were *entrusted* to him, and there could be no embezzlement or even fraudulent conversion of them unless first they belonged to the plaintiffs and, secondly, were by them entrusted to Ames, and this fully appears by the definitions of embezzlement and fraudulent appropriation under point V of counsel's own brief (Pp., 17, 18). Not only do the replications fail to aver that the goods were entrusted by plaintiffs or their agents to Ames, but the evidence shows exactly the contrary, and counsel admits it on page 3 of his brief, where he says: "Not being able to find Ames he (Phillips) "stated to the porter that he would leave the wines in his "charge that night." And on page 10 of counsel's brief, the witness Phillips is quoted as follows: "I remarked to "the man in charge that I would leave them there in his "charge." *There is no proof that Ames was ever informed*

that such a remark or statement was made even to his porter.

Ames had a perfect right to assume, so far as the proof shows, that the goods were unconditionally delivered, and that he was at liberty to ship them away as he had been doing with other wines all along, and that it would be time enough to pay when the bills were presented to him. The custom of delaying collection from three to thirty or forty days after delivery, even in case of sales called *cash sales* in the trade, is abundantly shown by the testimony of the witnesses for defendants in error, Lynch, Carmichael and others, collated on pages 56 and 57 of our first brief in this court, to which pages we earnestly invite the court's most serious attention.

We quite agree with counsel for defendants in error that the word *debt*, as used in § 5117, is co-extensive with claim, demand or liability. It means substantially the *cause of action.*

A debt or claim for goods bargained and sold, is one thing; a debt or claim for goods sold and delivered, is another thing entirely.

To main ain an action for the former, no proof of delivery is essential; but to maintain the latter action, the one brought in this case, such proof is indispensable.

But defendants in error contend, in argument, that Ames was guilty of fraud precisely because the wines that he disposed of were not delivered to him. And they further claim that in disposing of wines which he had no right to dispose of, because they were *not* delivered to him, he was guilty of fraud in the creation of the debt sued upon, which is for wines that *were* delivered to him. We fail to see the logical consistency of these two propositions.

This, however, is clear: if the goods were not sold and *delivered*, then the debt sued for in this action never existed, never was created by fraud or otherwise. If a debt existed for goods bargained and sold, it was not the debt now sued for, and whether, if such a debt did exist it was created by any fraud of Ames is not a question now before the court. The discharge was pleaded to the declaration and to the debt therein sued upon. It was not pleaded to a debt for goods bargained and sold, a debt not sued upon.

Counsel seems to be aware that something was wrong with his declaration, that it averred a debt that never existed, and that it required amendment "stating" (we quote from his brief, p. 22,) "that the goods were bar-"gained and sold to defendant and tendered at his store-"house for delivery," etc., instead, as now, of counting for goods sold and delivered.

We doubt whether the case which the learned counsel seeks to make would have been at all improved by such an amendment, but had it been made, and had a different debt or claim been thereby declared upon from that to which the defendant had pleaded his discharge, it is obvious that the defendant must have been permitted to plead anew to the amended *narr.* and wholly different issues might have arisen.

In view of the evidence arrayed on pages 8 to 10 of counsel's brief to the effect that the wines were not only never *delivered*, but never even *tendered* to Ames, it is difficult to understand how the learned counsel could hope to maintain either the present action for goods sold and *delivered*, or the action for goods bargained, sold and *tendered*. Not only Phillips and Carmichael testified that the wines had never been delivered, and brought the re-

plevin suits, says Mr. Goudy, (Rec., 44) on that theory, and not upon the theory of enforcing a vendor's lien, but Moir & Co. took the same position when they sued their said agents, Phillips & Carmichael, in assumpsit on the common counts for money had and received of H. H. Shufeld, "for 100 barrels of high-wines of *ours* sold them." (Original Rec., 312.)

We wish to disclaim the position ascribed to us on page 12 of counsel's brief. We did not and do not contend that a *debt*, within the meaning of § 5117, may not be created otherwise than by contract. But we do contend that when a contract of sale such as that sued upon obligates one party to deliver and the other to pay, upon the happening of certain events or contingencies, the obligation to deliver and the undertaking to pay upon the happening of those contingencies, are in themselves liabilities, or debts, from the start, and are created by and coeval with the contract. In other words, the delivery and the payment are mere terms of the contract to be performed under and according to it. Whenever they are performed, their performance, instead of creating a debt, extinguishes a debt, claim or liability, previously created by the contract. The debt, claim or liability so created by the contract, is none the less such because it may not be payable or performable until a future day—*solvendum in futuro*, nor because it may in fact never be paid or performed. The obligation exists whether it be performed or not. The performance does not create the obligation, but is created by it. Counsel's argument proves too much. No executory contract ever executes itself; yet every such contract is binding, and creates correlative rights, duties and obligations. Counsel's fourth point (Brief, 15) adds nothing to the strength of his argument.

Of course, the vendors had the right to retain the property as their own on refusal of the vendee to pay the contract price, but why? Because such was in law, *the obligation* of the contract, in case the vendee refused to pay, which morever was an obligation that the vendors could compel him to fulfill.

The authorities cited in counsel's brief (p. 15) in support of the vendor's choice of three remedies have no application to actions for goods *sold and delivered*, but relate solely to actions for not *taking and paying* for the property. Yet *Bagley* v. *Findlay*, is seemingly the chief reliance of the Supreme court of Illinois in its opinion, (Rec., 157), which simply tends to prove that the nature of the debt sued on, viz: goods sold, delivered and accepted, was not by that court kept steadily in view. The bankruptcy question involved seems to have been treated as a very minor and subordinate issue, but a few lines being devoted to it in the opinion, (Rec., 188); and nothing in those few lines indicates that fraud in the creation of the debt was considered by the court with reference to a debt for goods sold and delivered. The opening sentence of the opinion (Rec., 184) describes the action merely as one for high-wines *sold* by the plaintiffs to defendant.

On page 21 of counsel's brief is the following, with reference to the third replication to our pleas of discharge: "No question was raised by the defendant as to the legal "sufficiency of this replication to show that the debt was "created by the defendant's fraud, either by demurrer or "motion or otherwise, in the trial court." This is a mistake. We *excepted* to each and all of the instructions given for the plaintiffs (Rec., 167), one of which, the 7th (Rec., 166, 167) was as follows:

"No. 7. A discharge in bankruptcy constitutes no de-
"fense to a debt created by the actual fraud of the de-
"fendant; and if the jury find from the evidence that the
"debt sued for was created by the fraud of the defendant
"in the manner and form as stated in the replications of
"the plaintiffs to defendant's pleas setting up the dis-
"charge in bankruptcy, then such discharge in bank-
"ruptcy set up in said pleas, would constitute no defense
"in this action." (*Given.*)

The learned counsel is again mistaken when he further says on page 21: "Nor was any error assigned, either "in the Appellate court for the first district of Illinois, or in "the Supreme court of that state, in any manner raising "the question that the facts averred in either of the "replications to the pleas of discharge in bankruptcy were "not a sufficient answer to those pleas, if true."

The contrary of this assertion is true. The *fourth* assignment of error in the Appellate court (Rec., 177), is that the trial court erred in giving to the jury the instructions, and each of them given for the plaintiffs, one of which was the above copied seventh instruction for plaintiffs (Rec., 166, 167); and the fifteenth assignment in the said Appellate court (Rec., 178) is that the trial court erred in overruling the motion of the defendant for a new trial, which latter motion is set forth on page 174 of the record, where the third ground of the motion is the giving of all and each of plaintiffs' instructions.

The assignments of error in the Supreme court (Rec., 182) are that the Appellate court erred in not sustaining the several assignments therein made for the reversal of the judgment of the trial court, two of which are above mentioned.

The averment in the third replication that Ames was insolvent at the time of the delivery was utterly disproved, as shown by the evidence collated on page 52 of our first brief. There is indeed no countervailing evidence.

Any further reply we might wish to make to the brief of the learned counsel for defendants in error will be found to have been already anticipated in our first brief.

JOHN G. REID,
WILLIAM H. BARNUM,
Attys. for Plffs. in Error.

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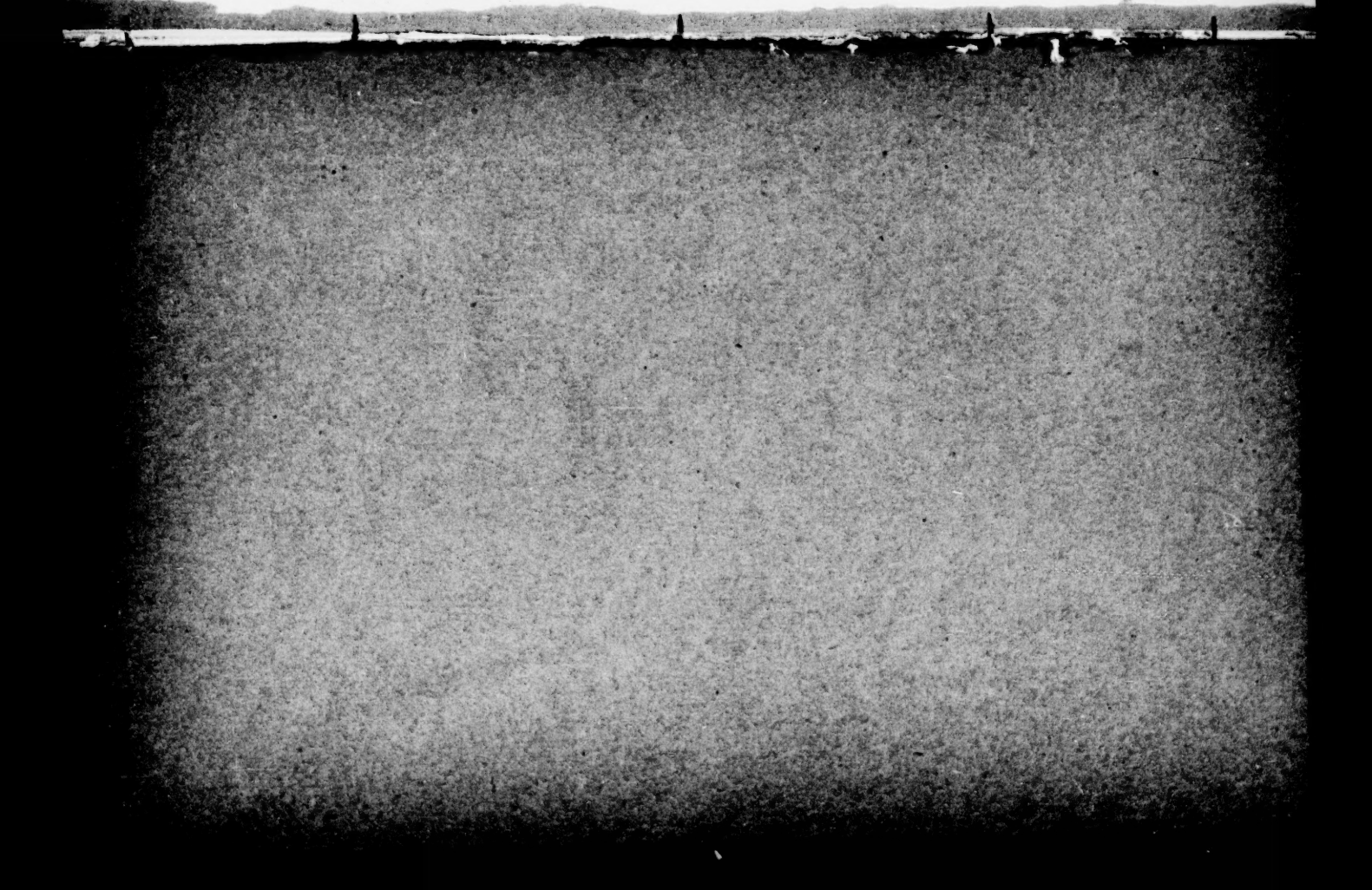
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT

FOR DEFENDANTS IN ERROR.

JAMES K. EDSALL,
ATTORNEY FOR DEFENDANTS IN ERROR.



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1890.

No. 1404.

WILSON AMES,
Plaintiff in Error,
vs.
ROBERT MOIR, JOHN C. NICOL AND JAMES PETERSON, LATE PARTNERS UNDER THE FIRM NAME OF ROBERT MOIR & CO.,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

STATEMENT OF CASE.

This was an action of assumpsit, brought in the Superior court of Cook county, Illinois, by Robert Moir & Co. against Wilson Ames, upon the following contract:

"CHICAGO, June 9, 1870.

Contract: I have this day bought of Robert Moir & Co. one hundred (100) barrels of highwines, 'iron bound,' at one dollar and seven cents ($1.07) per proof gallon. The conditions of the sale are as follows: The buyer can call from the 1st of July to the 20th of the same month by giving three days' notice, and if not called for by the 20th of July, the seller has the privilege of delivering up to the end of July by giving three days' notice; to be delivered in fifty barrel lots. To insure the fulfillment of this contract a margin of three hundred dollars will be put up by both parties.

(Signed) WILSON AMES."

It appears that at the date of the contract Robert Moir & Co. were distillers at Oquawka, Illinois, and Wilson Ames was a rectifier and dealer in highwines at Chicago. On June 30, 1870, plaintiff's bonded warehouse, containing the highwines they expected to deliver on the contract, was destroyed by fire, whereupon they instructed Phillips & Carmichael (who were commission merchants in Chicago) that in case Ames called for the wines, under the contract, before Moir & Co. had on hand sufficient wines of their own manufacture to meet the call, to buy the wines in the Chicago market, on account of Moir & Co., and deliver the same to Ames, and collect therefor in accordance with the contract.

On July 15, 1870, Ames made a call on Phillips & Carmichael for the highwines deliverable on the 18th of July. Inasmuch as Moir & Co.'s wines had been burned (and the market price of highwines having declined), Phillips & Carmichael proposed to Ames that he should settle by paying the difference between the market and contract price, and as an inducement to accept this offer proposed to allow him the benefit of a small per cent. per gallon above the market price.

Ames refused to accept this offer, stating that he wanted the wines to rectify, and required them to be delivered. (Printed Rec., 60, 61.)

On the 18th of July Phillips & Carmichael accordingly bought 100 barrels of highwines on account of Moir & Co., and caused the same to be delivered at Ames' store in the course of the afternoon of that day. Fifty barrels of the wines were bought from Conklin & Bro. and fifty from Lynch & Co., and these parties were instructed to deliver the same at Ames' store and collect from Ames the contract price—$1.07 per proof gallon—and retain therefrom ninety-eight cents per gallon, the price they were to receive for the wines, and pay over the balance for Moir & Co. The deliv-

ery of the wines at Ames' store was not completed until about 6 o'clock in the afternoon. The parties making the delivery were unable to find Ames, to make the collection from him. Thomas S. Phillips, of the firm of Phillips & Carmichael, went to Ames' place of business twice in the afternoon of July 18th to see that the wines were delivered and paid for by Ames, as required by the contract; and upon inquiry was unable to find either Ames or his book-keeper. No one was to be found about the premises but a porter or laboring man attending to the rolling in of barrels as they were delivered. The first time Phillips remained at Ames' store about an hour, and the second time he remained there half an hour, and it was nearly 6 o'clock when he left. Not being able to find Ames, he stated to the porter that he would leave the wines in his charge that night, and would return as soon as he came down the next morning. Phillips accordingly returned to Ames' store soon after 8 o'clock the next morning, and could neither find Ames, his book-keeper, nor the wines. He inquired of the porter in charge where Ames was, and he said he did not know. He looked in the back part of the store and found all the Lynch and Conklin wines gone, and the porter in charge told him they had been shipping some away. He then went to their office to get his partner, and says:

"I told Mr. Carmichael there was something wrong; I used the expression, 'There is a nigger in the fence.' I got Mr. Carmichael, and we went to Ames' place. We then ascertained that there had been some wines taken from there *the night before, after I had left, and early the next morning*, to the depot. We went immediately over to the Michigan Central depot and made inquires, and we found the Conklin lot of wines in a car. The Lynch wines had gone off." (*Id.*, 162, 163.)

All this time Ames kept out of sight; at all events it appears that neither Phillips nor Carmichael nor Lynch's book-keeper, were able to find him to make the collec-

tion. (*Id.*, 36, 38, 62, 156, 162.) The wines were not paid for, and the result was that Phillips & Carmichael immediately commenced a replevin suit in their own names, against the Michigan Central Railroad Company, in the Superior court of Chicago, to recover the fifty barrels found at the depot, and also intercepted the other fifty barrels at Detroit, and there, in like manner, replevied them. Phillips & Carmichael sold the wines they had thus replevied to Shufeldt & Co. at ninety-seven cents per gallon, the then market price, and deposited the proceeds in bank in their own names, to await the result of the replevin suits. It appears that between the time the wines were delivered at Ames' store, late in the afternoon of the 18th of July, and the time Phillips reached the store the next morning, Ames had sent the wines to the Michigan Central depot, shipped the same, and obtained bills of lading therefor, which he attached to drafts on the consignee in New York, one for $2,800 and the other for $2,900, and procured the drafts to be discounted by the National Bank of Commerce of Chicago, on the security of the bills of lading.

On the morning of July 19, 1870, a judgment was entered up against Ames, by confession, in favor of a former partner, upon which execution was issued, under which the sheriff immediately took possession of and closed up Ames' store.

Upon being informed of this levy, Ames checked out of the bank the proceeds of the drafts discounted on the security of these wines, and caused the same to be paid to one Barnes, of Akron, Ohio, whom he identified at the bank, so that he could receive the money on the check. (*Id.*, 50, 51, 118.)

The replevin suits appear to have been defended by the National Bank of Commerce, to which Ames had so pledged the bills of lading. The result was, that the defense set up by the bank, that it was the pledgee of the wines from Ames

in good faith, and without notice of Moir & Co.'s rights, was ultimately successful. (*Id.*, 29, 34.)

Mich. Cen. R. R. Co. v. *Phillips*, 60 Ill., 190.

The replevin suit at Detroit was decided the same way. (Printed Record, 45, 46.)

After the final decision of the replevin suits, Phillips & Carmichael paid over to the National Bank of Commerce the money derived from the re-sale of the highwines, in satisfaction of the judgments the bank had recovered against Phillips & Carmichael in these suits. (*Id.*, 56, 163.)

In this manner it appears that the money derived from the re-sale of the highwines was applied to the payment of Ames' debt to the bank, to secure which he had so pledged the bills of lading, which represented the wines; and there appears to have been nothing left from the proceeds of such re-sale to apply on appellees' claim against Ames.

After Phillips & Carmichael had failed to collect the pay for the wines from Ames, on July 19, 1870, they drew upon Robert Moir & Co. at Oquawka (through the Union National Bank) for the amount of the bills of Conklin and Lynch for the highwines, at ninety-eight cents per proof gallon, and with the proceeds of this draft paid their bills. It appears that Robert Moir & Co. paid this draft, amounting to $6,476.99, on presentation, July 21, 1870. (*Id.*, 78, 163.)

Ames has never paid for the wines, and the money advanced by Robert Moir & Co. has never been in any way refunded to them.

Various defenses were interposed by Ames, the defendant, in the trial court, none of which were sustained. The only defense, however, upon which it is claimed any question arises, subject to review in this court, is that based upon the second

and third pleas setting up the defendant's discharge in bankruptcy. (*Id.*, 8.) To these pleas the plaintiffs in the trial court filed three replications as follows: (1.) *Nul tiel* record as to the discharge in bankruptcy. (2.) A replication stating in general terms that the debt sued for was created by the fraud of the defendant; and (3) a special replication to the same effect, setting up the facts and showing the manner in which the defendant perpetrated the fraud whereby the debt was created. (*Id.*, 10, 11, 12.) To these replications rejoinders were filed by the defendant, traversing the averments that the debt sued for was created by the fraud of the defendant, as alleged in the replications, upon which issues were joined. (*Id.*, 13.)

Upon the trial of the cause in the Superior court May 21, 1887, the jury found the issues for the plaintiffs and assessed their damages at $10,634.03, upon which judgment was rendered in that court June 18, 1887. From this judgment Ames appealed to the Appellate court for the First district of Illinois, where judgment of affirmance was rendered December 7, 1888, and thereupon he prosecuted a further appeal to the Supreme court of Illinois, where the judgment of the Appellate court was affirmed October 31, 1889, and a petition for rehearing therein denied March 10, 1890. (*Id.*, 181, 189, 190.)

From the judgment of affirmance in the Supreme court of Illinois Ames sued out the present writ of error from this court.

An examination of the record will show that the rulings of the trial court upon the only federal question arising in the case were in strict conformity to the decisions of this court upon like questions, viz: that the fraud of the bankrupt in the creation of the debt in order to except the same from the operation of his discharge in bankruptcy must be "positive fraud,

"or fraud in fact, involving moral turpitude or intentional "wrong, and not implied fraud or fraud in law, which may "exist without the imputation of bad faith or immorality." (*Id.*, 149, 167, 173.)

Under rulings and instructions of the court of this character upon the question of fraud in the creation of the debt sued for, the jury, in view of all the evidence in the case, found that issue in favor of the plaintiffs in the trial court, and the evidence was amply sufficient to sustain the verdict.

Upon that question it is said in the opinion of the Supreme court of Illinois, as contained in the record:

"It is apparent from the evidence that Ames had no intention of paying for the wines when he called for them on the 15th day of July. His object seemed to be to get possession and control of the wines and *convert them to his own use without payment*. This the evidence tends to show he did, and thus the debt was created." (*Id.*, 188.)

Ames v. *Moir et al.*, 130 Ill., 582, *593*.

The jury appear to have been correctly instructed upon the law of this question, and their finding upon the question of fact is, of course, not subject to review in this court.

The evidence clearly shows, and the jury had the right to find that the agents of Robert Moir & Co. never surrendered, or intended to surrender, their control over the highwines to Ames without payment. By force of circumstances, they were compelled to leave the 100 barrels in Ames' storehouse over night, and he fraudulently made away with them between 6 o'clock that evening and early the next morning. The following appears in the record:

Carmichael testified thus:

"Mr. Phillips, when he came to the office, said that the wines were delivered there while he was there—they were unloading the last of the wines between 5 and 6; *that he couldn't*

find Ames or Ames book-keeper, or anyone there to pay for them, and he requested the laborer in charge there to keep the wines, or leave them there till morning—that he would come there and see Ames the first thing in the morning; *that so far as we were concerned, that we received the wines there—that they were delivered to us,* I suppose." (Printed Record, 69, 70.)

Thomas S. Phillips testified as follows:

"Q. Did you go to Wilson Ames' business house on River street the 18th of July?

A. I did.

Q. What time of day?

A. Well, it was from 4 to 6 o'clock.

Q. Can you fix the time any more definite than that?

A. I could not.

Q. Were you there more than once?

A. I was there twice.

Q. Fix the time as nearly as you can?

A. Well, I think one was somewhere between 4 and 5 o'clock, probably half past four; the next time I was there between 5 and 6.

Q. What did you go there for?

A. *I went there for the purpose of tendering Mr. Ames* 100 barrels of highwines for account of Moir & Co.

Q. Did that include the fifty barrels purchased from Conklin, now in question?

A. Yes, sir.

Q. Did you find any of these wines purchased of Conklin there the first time you went?

A. I did.

Q. Were they all there at that time?

A. Well, no, sir.

Q. The second time that you went, were they all there?

A. Well, I think that they were delivering the last of them while I was there.

Q. You say "they." Who was doing it?

A. The teamsters.

Q. Did you find Mr. Ames there?

A. No, sir.

Q. Either time?

A. No, sir.

Q. Did you find any clerk or book-keeper?

A. No, sir.
Q. Who did you find?
A. I found a laboring man there.
Q. Did you endeavor to ascertain where Ames or his clerk were?
A. Yes, sir.
Q. Did you get any information about it?
A. They didn't know—the men in charge didn't seem to know where they were.
Q. How long did you remain?
A. Oh, I remained—I was probably there for an hour the first time, and about half an hour the last time.
Q. What time did you leave the last time?
A. Well, at pretty near 6 o'clock.
Q. *Did you make any tender of the wines to anybody?*
A. *No, sir.*
Q. Nobody to make them to?
A. I simply remarked to the man that I would leave those wines there until morning—*I wanted to collect for them before I delivered them*—I would be there in the morning—told him to tell Mr. Ames that I would come down.
Q. Did you go there the next day?
A. Yes, sir.
Q. What time?
A. It was about 9 o'clock.
Q. Anyone go with you?
A. Not the first time; no, sir.
Q. What did you go there at that time for?
A. *I went there to make the tender.*
Q. Who did you find there then?
A. I found this same man.
Q. Did you make any tender?
A. I didn't find Mr. Ames; I couldn't do it." (*Id.*, 73, 74.)

On Cross-Examination.

"Q. What did you say you went down to Ames' place for?
A. *To make a tender of those wines.*
Q. For any other purpose?
A. No, sir.
Q. Just simply to tender them?
A. Simply to tender them and deliver them.

Q. Did you go to collect your bill?

A. I intended to go right from there to Conklin and see that the bill was collected, but I couldn't find Ames to deliver the wines to, and therefore I didn't go." (*Id.* 75.)

The testimony of the same witness, read by consent from the printed abstract, in *Phillips et al.*, v. *Moir et al.*, is as follows:

"I went to Ames' store on the afternoon of the 18th of July, for the purpose of making a tender of these wines to Ames on Moir's contract for Moir. I went there and Ames was not there, nor his book-keeper. The wines were being delivered by Conklin and Lynch, and also the Northwestern company's teams were delivering wines there. I waited there half or three-quarters of an hour, when Ames did not come.

"The man in charge said he thought he would be there—he had gone away somewhere, and I left and went away to the north side of the river and got my horse and buggy, and I drove back to Ames' place and he was not there, and this man in charge said he had not been there.

"I waited there some little time. The wines were about the last of them delivered when I left there, somewhere near 6 o'clock, and I remarked to the man in charge that I would leave them there in his charge. I *told him what I had come for*—to deliver the wines upon the Moir sale, and I would be there as soon as I came down in the morning, and I left.

"The first time I called was about 4 o'clock—a little after, between 4 and 5—and the wines we bought from Lynch and Conklin were being delivered while I was there.

"They were being placed at the back part of the store. The person I saw there seemed to be a porter in charge, taking care of them—roling them away and keeping each lot by itself.

"I went there the next morning a little after breakfast—after 8 o'clock, I should think. I inquired for Ames, and he was not there; I inquired for the book-keeper and he was not there. I asked where he was, and he said he had gone fishing—that is the book-keeper. I inquired where Ames was; he said he didn't know. I then began to look into the back part of the store, and found all the Lynch and Conklin wines gone. I asked the man in charge, and he said they had been shipping

some wines from there. I immediately got into the buggy and drove up to our office. I told Mr. Carmichael there was something wrong. I used the expression there was a 'nigger in the fence' about those wines. I got Mr. Carmichael and we went back to Mr. Ames' place. We then ascertained that there had been some wines taken from there the night after I left, and early that morning, at the depot. We went immediately over to the Michigan Central depot and made inquiries, and we found the Conklin lot of wines in a car; the Lynch wines had gone off. I went to Conklin's place and got his book-keeper and he came down and identified the wines." (*Id.* 162–3.)

It appears that both of Ames' drafts were dated July 18, 1870, and one of the bills of lading bears the same date, and the other July 19, 1870. (*Id.* pp. 93, 94.)

It is a fact worthy of note, that both Ames and his book-keeper kept out of sight during the visit of the agent of Moir & Co., up to 6 o'clock in the evening of July 18th, and yet after Mr. Phillips had left, made their appearance in time to make the drafts and ship one of the car loads that evening, and the other early the next morning, in time to get it on the cars before Phillips and Carmichael appeared again on the scene.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

I.

In a case of this character it is the proper practice for the plaintiff to sue or declare on the contract, and when the discharge in bankruptcy is pleaded, reply, showing that the debt was created by fraud of the defendant.

Bump on Bankruptcy (3d Ed.), pp. 742–3.
Stewart v. *Emerson*, 52 N. H., 301.
Classen v. *Schœnemann*, 80 Ill., 304.
Stokes v. *Mason*, 10 R. I., 261.
Brodnax v. *Bradford*, 50 Ala., 270.
Strang v. *Bradner*, 114 U. S., 555, 560.

II.

As to the meaning of fraud in the creation of the debt.

In order to bring the case within the purview of section 5,117 of the bankruptcy law it is not necessarily required that the contract sued upon should have been tainted with or procured by the fraud of the bankrupt. It is only required that the *debt* should be *created* by his fraud.

Rev. Stat. U. S., § 5,117.
Classen v. *Schœnemann*, 80 Ill., 304, 306.
Hinckley v. *Lewis*, 45 Ill., 327, 328.
Mathews v. *Cowan*, 59 Ill., 342, 347.

The contention of counsel for plaintiffs in error that the *debt* mentioned in this section must necessarily be created exclusively by *contract* in order to be brought within its terms is

clearly untenable. Such a construction is precluded by the very terms of this section of the statute. Thus:

"§ 5,117. No *debt created by the fraud or embezzlement* of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy."

It is manifest that *debts* created either by fraud or embezzlement are not necessarily, or exclusively based on contract. Liability for fraud or embezzlement may exist either with or without contract. The word *debt*, as used in this section, is employed in its enlarged sense and co-extensive with the terms, claim, demand or liability.

Stokes v. *Mason*, 12 Bankrupt Reg., 498.
Same Case, 10 R. I. Rep., 261.
Strang v. *Bradner*, 114 U. S., 555, 560.

III.

The contract in question did not of itself alone create the debt. It was wholly executory on both sides.

An examination of the contract in question will show that it did not, without further acts of performance of its terms, create any debt whatever against either party. (Printed Record, 6, *ante* p. 1.) If each party thereto, after the making of the contract, had remained passive, and neither demanded from the other or tendered performance thereof in accordance with its terms during the month of July, 1870, no *debt* would have resulted therefrom in favor of or against either party. If Ames, the buyer, had not called for the highwines during the first twenty days of July, 1870, and Moir & Co., the sellers, had not tendered the wines on three days notice, as authorized by the contract, within the residue of that month, the contract would have spent its full force and neither would have owed the other anything thereon. It is true the contract is the basis or foun-

dation of the action, but the *debt* arising thereon and sued for, grew out of the acts of the parties in relation to the performance of the contract, and herein the fraud consisted.

If the declaration had simply set up the making and delivery of the contract, and that Ames had not paid the contract price for the highwines, and nothing more, it would have been clearly defective in not stating facts sufficient to show a cause of action, or the existence of any debt whatever. The facts, therefore, connected with the performance of the contract, were an essential part of the transaction, resulting in the creation of the debt. The defendant's fraud entered into this part of the transaction, and thereby the debt was created, within the meaning of the bankrupt law.

Numerous authorities have been cited by the learned counsel for plaintiff in error, but none of them apply to a case of this character. Undoubtedly the law is that the statute of frauds in respect to hindering and delay of creditors relates back to the date of an executory contract on which the creditor's claim is based; and that statutes which in terms speak of fraud in the contract itself, may properly be limited to fraud in such contract alone; and that provisions of statutes, or state constitutions, which prohibit municipalities from incurring indebtedness beyond a prescribed per cent. on the assessed valuation, prohibit, not only the borrowing of money, but the making of executory contracts by such municipalities, which, if performed or carried into execution, would result in an indebtedness beyond the prescribed limit. Authorities of this class, so liberally cited, have no tendency to show that fraud in the performance of an executory contract resulting in a debt, is not fraud in the creation of such debt within the meaning of the bankrupt law. The decisions of this court, cited by counsel, upon this class of questions, are perfectly consistent with the positions we have here maintained.

IV.

The Vendors had the right to retain the property as their own on the refusal of the vendee to pay the contract price, and thus the debt therefor would not have existed.

"The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice of three remedies: 1. He may store or retain the property for the vendee, and sue him for the entire price. 2. He may sell the property, acting as the agent, for this purpose, of the vendee, and recover the difference between the contract price and the price of re-sale; or, 3. He may keep the property as his own, and recover the difference between the market price, at the time and place of delivery, and the contract price."

Benjamin on Sales (2d Ed.), p. 730, § 788.
Dustin v. *McAndrew*, 44 N. Y., 72.
Hayden v. *Demets*, 53 N. Y., 426.
Bagley v. *Findlay*, 82 Ill., 524.

If the vendors in this case, had been permitted to avail themselves of either the second or third remedy specifical above, the debt sued for would have had no existence. The first instruction given to the jury at the request of the defendant in the trial court, virtually concedes this position. That instruction is as follows:

"The jury are instructed that the law is, where personal property is, by contract, sold for cash to be paid on delivery, the delivery and payment are to be concurrent acts, and therefore, if the goods are put into possession of the buyer in expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once *reclaim the goods*, UNLESS SOME OUTSIDE PARTY HAS FOR VALUE AND WITHOUT NOTICE OF THE SELLER'S RIGHTS ACQUIRED AN INTEREST THEREIN OR BECOME THE OWNER THEREOF." (Printed Rec., 167.)

It is manifest, that if plaintiffs had been permitted to exercise their conceded right to "reclaim the goods," the debt sued for would not have existed. The fact was not only clearly proven, but it was one of the conceded facts on the trial, that the defendant had wrongfully obtained the highwines, and pledged them to the bank, and thereby defeated the plaintiff's right to retain or reclaim the goods. At the conclusion of the opening statement to the jury by defendant's counsel, there appears the following:

"Mr. Robert Moir had cause of action against us after getting the whisky; he had cause of action *for the proceeds of the property wrongfully obtained*. We got their goods, and we consigned and pledged them; they had a cause of action against us, but that was outlawed in five years; they could not bring that, and they had to bring action upon this little piece of paper." (*Id.*, 18.)

Upon the clearly proven and undisputed facts of the case, it cannot be denied that Ames wrongfully obtained the goods, and pledged them to the bank in fraud of the rights of the plaintiffs, and thereby put it out of their power to recover and retain the goods. He thereby fraudulently placed the sellers in the predicament described in the last clause of defendant's instruction before quoted.

It clearly appears from the evidence quoted in our statement of the case (*ante* pp. 8–11), that Phillips and Carmichael, as agents for Robert Moir & Co., caused the 100 barrels of highwines to be delivered *at Ames' storehouse* for the purpose *of tendering the delivery thereof to him, and collecting the contract price therefor, and that, on account of Ames absence, they did not in fact make such delivery or tender of the highwines to Ames.*

The 100 barrels of wines were ponderous, and under the circumstances, plaintiff's agents were compelled to leave the wines in Ames' storehouse over night, without in fact deliver-

ing the same to him. He took an unfair advantage of this presence of the highwines in his storehouse, and after plaintiffs agents had left at 6 o'clock that night, and before their return the next morning, he fraudulently so disposed of the highwines as to defeat the plaintiff's title thereto.

V.

The fraudulent disposition and appropriation of the Highwines was sufficient to obviate the discharge under the bankrupt law.

The effective words of the statute are: "No debt created "by the *fraud or embezzlement* of the bankrupt * * * "shall be discharged by proceedings in bankruptcy."

Rev. Stat., U. S., § 5,117.

This association of the words *fraud* and *embezzelment* in the same sentence throw a strong light upon each other, and properly aid in their interpretation.

Neal v. *Clark*, 95 U. S., 704, 709.

The term embezzelment is thus defined:

"*Embezzelment*. The name of a statutory offense which "consists in the *fraudulent* appropriation of property by a "person to whom it has been entrusted."

1 Abbott's Law Dict., p. 421.

"*Embezzelment* is the fraudulent appropriation to one's own "use of the money or goods entrusted to one's care and con- "trol by another." (*Id.*, p. 422.)

Fagan v. *Knox*, 4 N. Y. Sup. Ct., 41.

A bailee may be guilty of embezzelment.

2 Wharton's Crim. Law, § 1,946.

The fraud practiced in this case by the defendant, Ames, was the wrongful and fraudulent appropriation of the high-wines temporarily entrusted to his keeping over night, and thereby defeating the vendor's right to retain the same, and the enforcement of their property rights therein.

The essence and gist of this fraud is closely alied to, if not legally identical with, the offense of embezzelment.

If a *debt* within the meaning of this statute may be *created* by embezzelment, then a debt created by a fraudulent appropriation of the property of this description, must likewise be within the exception to the operation of the bankrupt's discharge under this statute.

V I.

As to the Second and Third Replications averring Fraud in the creation of the debt in reply to the Pleas of Discharge in Bankruptcy.

Counsel for plaintiff in error in their argument (page 34) state that "the second and third replications are each demurrable."

The second replication to the second and third pleas, which set up the discharge in bankruptcy, states in the language of the statute, in general terms that the "debt in the plaintiff's "declaration mentioned and sought to be recovered was "created by the fraud of the defendant," etc. (Printed Rec.. 10.)

Such a plea averring fraud in the creation of the debt, in such general terms, was held sufficient in:

Stewart v. *Emerson*, 52 N. H. 301.
Stokes v. *Mason*, 10 R. I., 261.

It might possibly be held in some courts, or under some

systems of practice, that the plea should state facts indicating the general character of the fraud imputed. This criticism of the replication could only be raised by special demurrer, and as the replication states, a substantial defense, any supposed defect therein was cured by filing a rejoinder and taking issue thereon.

The third replication to the pleas setting up the defendant's discharge in bankruptcy, states facts which show the manner in which the debt was created by the fraud of the defendant. (Printed Rec., 11.)

This replication shows that the plaintiffs had delivered the highwines on the 18th of July, 1870, in successive truck loads, *at defendant's storehouse*, "*with the understanding that the terms* "*of the contract would be complied with, and that said high-* "*wines would be paid for when such delivery would be com-* "*pleted*"; that such delivery was not completed until near the close of businesss hours, at 6 o'clock in the afternoon of that day; that the defendant could not then be found at his place of business to make payment for the highwines, that it was then so late in the day that plaintiff's agents, who had charge of the delivery, could not on that day remove the highwines from defendant's storehouse, and so they were compelled to permit the highwines to remain in defendant's storehouse until the next morning without receiving payment; that the defendant was then insolvent and about to fail in business, which he then well knew, but such fact of insolvency was wholly unknown to plaintiffs; that immediately after said highwines had been so left in defendant's storehouse, between 6 o'clock in the evening of July 18, and the next morning of July 19, 1870, the "defendant, well knowing that he had not paid for said high-"wines, and had no right to dispose of the same until he had "paid therefor, and without the knowledge or consent of "plaintiffs, *and fraudulently intending not to pay for said high-*

" *highwines, and to place the same where the plaintiffs could* " *not enforce their rights therein to secure payment of* " *the purchase price thereof, and thereby to cheat and* " *defraud the plaintiffs on the premises*, caused said highwines " to be delivered to the Michigan Central Railroad Company " to be shipped from the city of Chicago, consigned to a con- " signee at the city of New York," and procured bills of lading therefor, which he pledged to the National Bank of Commerce to secure drafts on the consignee for $5,700, which the defendant discounted at said bank, which advanced the money to defendant, on the security of said bills of lading, " *and that the* " *defendant thereby fraudulently invested said bank* with a lien " and claim on said highwines for the amount of said drafts so " discounted for defendant, not only as against the said defend- " ant, but also as against the plaintiffs, notwithstanding the de- " fendant had not paid plaintiffs for said highwines, *all of which* " *was contrived and done by the defendant with the intent to* " *(and the defendant thereby did) obtain said highwines without* " *payment therefor as required by said contract, and thus cheat* " *and defraud the plaintiffs in the premises.*" * * * " And " so the plaintiffs, in fact, say that the said debt in the declara- " tion mentioned, and sought to be recovered in this suit, was " created by the fraud of the defendant, and is by the act of " Congress in that behalf excepted from the operation of said " discharge in bankruptcy in said pleas mentioned. (Printed Rec., 10, 11, 12.)

The statements in this replication expressly and in terms averring the defendant's fraudulent intent, and after stating the salient facts of the transaction, also aver that " all of which " was contrived and done by the defendant with intent to " (and defendant thereby did) obtain said highwines without " payment therefor, etc., and thus to cheat and defraud plaint- " iffs in the premises," etc., are not mere conclusions of law,

as claimed by counsel for plaintiff in error. They are issuable averments of fact charging fraud in the defendant by obtaining possession of the highwines and disposing of the same as alleged in the replication.

This replication was not only clearly sufficient to show that the debt in question was created by the fraud of the defendant, but its sufficiency in this particular was conceded by the defendant in the trial court by the course of his pleadings.

The defendant also filed a rejoinder to this replication, and thereby traversed the same (*Id.* p. 13) and thus admitted its sufficiency as a bar to his discharge in bankruptcy. The jury found the issues of fact for the plaintiff. (*Id.* p. 14.) No question was raised by the defendant as to the legal sufficiency of this replication to show that the debt was created by the defendant's fraud, either by demurrer or motion, or otherwise in the trial court. The motion in arrest of judgment made in the trial court and overruled, was based solely upon the alleged defect in the declaration, and the supposed insufficiency of the written contract therein set out. (*Id.* pp. 175, 176.) Nor was any error assigned either in the Appellate court for the first district of Illinois, or in the Supreme court of that state in any manner raising the question that the facts averred in either of the replications to the pleas of discharge in bankruptcy, were not a sufficient answer to those pleas, if true.

The Supreme court of Illinois will not review on appeal or writ of error, a question not raised below in the trial or Appellate court.

And the same rule obtains in this court. It is held that "the "record from the trial court must be taken in this court *as it* "*was presented to the Appellate court below*, and no objection "to it, not made there, will be considered here."

Keyser v. *Hitz*, 133 U. S., 138.

Inasmuch, therefore, as the sufficiency of this replication to the pleas of discharge in bankruptcy were not questioned in the state courts, it cannot now for the first time be raised in this court for review; and the jury having found the facts for the plaintiff in the trial court, the same is conclusive against the plaintiff in error upon the only federal question arising in the case.

A party ought not to be permitted to try a case through all the state courts on one theory, and when he is defeated there, to bring the record to this court and seek a reversal upon grounds not even raised, but conceded to be correct, in the state court.

If it should be urged that the third replication does not admit the delivery of the highwines to Ames, and is, therefore, a departure from the declaration, the reply to this suggestion is obvious.

If this replication was held to be a departure from the declaration, the defendant waived that objection when he rejoined thereto, and took issue upon the same. "The only mode of "taking advantage of a departure is by demurrer, which may "be either general or special; and if the defendant or plaintiff, "instead of demurring, take issue upon the replication or the "rejoinder containing a departure, and it be found against him, "the court will not arrest the judgment."

1 Chitty's Pleading, (13 Am. Ed.) *648.

Had such an objection been timely raised in the trial court, the same could have been readily obviated by an amendment, stating that the goods were bargained and sold to defendant and tendered at his storehouse for delivery, etc.

VII.

The Evidence was amply sufficient to sustain the verdict of the jury finding that the debt was created by the defendant's fraud.

For the present purposes, it is only incumbent on us to show that there was evidence before the jury *tending* to support the verdict in this particular, as this court will not assume to pass upon the conflicting testimony or determine the relative weight of the evidence on the opposing sides.

The facts as found by fhe jury, and affirmed in the Appellate court, were conclusive in the state Supreme court.

Ames v. *Moir, et al.*, 130 Ill., 582, 593.

In a common law action, on writ of error to a state court, if finding of facts by a jury, or by the court below, is conclusive in the state Supreme court, the same will be held concclusive in the Supreme court of the United States.

River Bridge Co. v. *Kansas Pac. Ry. Co.*, 92 U. S., 316, 317.

In the first place, it clearly appears from the evidence, set out in our statement of the case (*ante* pp. 8–11), that the high-wines were simply left at Ames' storehouse to remain until the next morning; but not, in fact, delivered to Ames, nor had Phillips and Carmichael, the plaintiff's agents, surrendered to him their control of the property.

They did not even *tender* the wines to Ames for the reason that Ames and his book-keeper kept themselves out of sight during the afternoon of July 18th, so long as plaintiff's agent appeared on the scene.

Phillips remained at Ames' place of business until the last of the wines were received there, at about 6 o'clock in the

afternoon, and then left with the statement that he would leave the highwines in the care of the porter, and return the next morning.

Nevertheless, it appears that Ames and his book-keeper promptly came in sight after Phillips left, otherwise they could not have made the two drafts on the consignee, both dated July 18, 1870, and also shipped and loaded one of the cars that same evening. This is shown by the date (July 18, 1870), upon one of the bills of lading. (Printed Rec., 50, 93, 94.)

The other bill of lading bears date July 19, 1870, (*Id.* 94) and it appears from the other evidence in the case, that this carload was sent to the depot and loaded so early in the morning that it was found loaded in the car before the arrival of plaintiff's agents. (*Ib.* 162–3.) Ames had called for the highwines on the 15th of July, deliverable on the 18th. It was an important transaction. He expected their delivery. Why did he keep out of sight during the afternoon of July 18th, while plaintiff's agent was there to deliver and collect for the highwines? Why did he appear on the scene immediately after Phillips left, and hurriedly send the highwines to the depot, and procure bills of lading to be attached to his drafts to be discounted at the bank?

The jury answered these questions, as we think any man of sound judgment and good sense would answer them, by finding the charge of fraud to be true, and that the defendant obtained and got the control and disposed of the highwines, with the intention and for the purpose of not paying for the same, and thereby deprived the plaintiffs of their right to retain the goods, who never intended to have parted with the possession thereof without payment, at the time of delivery to Ames. And so the fraud entered into the final consumation of the debt in question.

All of the evidence and circumstances appearing in the case supports this charge of fraud.

When Ames called for the wines on the 15th of July, he falsely pretended that "he wanted to rectify these wines," as a reason for not accepting the offer to compromise and pay but a part of the difference in price. (Printed Rec., p. 60.) It appears, however, from his own testimony, that he had then made arrangements to ship the wines to New York. (*Id.* 112.) He must have known that he was then insolvent. He had previously made his heavy purchases and experienced the decline in the market, and then he had the same information respecting his financial condition which he possessed after the sheriff's levy on the 19th of July. He states that he then "took his overcoat, went out, and didn't go back to the store for a month." (*Id.*, 131). This does not look like the conduct of an honest man struggling with adversity, and trying to save his credit. His conduct bears all the ear-marks of one conscious of guilt, slinking away from the scene of a consummated fraud. The jury had the right to find from all the circumstances, as disclosed by the evidence, that when he called for the wines and procured the same to be delivered at his storehouse he did not intend to pay for them, but had already formed a deliberate plan to defraud the plaintiffs out of their price; and that the manner in which he wrongfully took possession of the wines and disposed of the same, and thereby defeated the vendor's lien and placed the proceeds of the wines in the hands of his confidential friend, was but the successful accomplishment of a premeditated scheme of fraud.

It is true Ames denied, in his testimony, that he told plaintiff's agent that he wanted the wines to rectify. It was the province of the jury to pass upon the truth or falsity of these conflicting statements of the respective witnesses.

Upon his own concessions Ames appears to have sustained such relations towards this Barnes, of Akron, Ohio, to whom he spirited away the $6,000 so derived from these wines, that he claims that the $2,500 which Haddock, the president of the bank, collected from Barnes on Ames' other drafts *after his failure*, was in fact Ames' money. (Printed Rec., pp. 18, 35, 128.) It is a pertinent inquiry, how did Barnes come to have any of Ames' money in his hands at that time? Was it the proceeds of the $6,000 check?

It may be truly said that Ames got away with the wines "between two days." And this he did, by wrongfully removing the wines from his storehouse, without the knowledge or consent of plaintiffs' agents, and without paying for them, and knowing that plaintiff had a vendor's lien thereon, and that he had no right to dispose of the wines until he had paid therefor. And when he drew his check upon the bank for the proceeds of these wines, and went to the bank with his friend Barnes, to see that the money was paid to him, he knew that everything he had in his store had been levied on and the store closed up by the sheriff, and that he was wrongfully misappropriating the money derived from the wines, upon which Robert Moir & Co. were entitled to a vendor's lien, when he had no hope or expectation of paying them from any other source.

The jury had the right to find from all the evidence appearing in the case, that in procuring the delivery of the wines at his storehouse, and wrongfully taking possession thereof and disposing of the same, without the knowledge or consent of plaintiffs or their agents, he consummated an unconscionable fraud upon the plaintiffs, and thereby brought into existence, or created, the debt resulting from such fraud.

While the facts of the case were different, yet this is a more aggravated case of fraud than that held sufficient to

avoid the discharge in bankruptcy, in *Strang* v. *Bradner*, 114 U. S., 555. The court there say: "If *Strang's* conduct does "not constitute positive fraud, or fraud in fact, involving inten- "tional wrong, it is difficult to conceive what circumstances "would have amounted to fraud of this character." (*Id.*, 560.)

This observation applies with, at least, equal force to the conduct of Ames in wrongfully taking the control of the high-wines, and secretly disposing of the same, without the knowledge or consent of the plaintiffs below, and in fraud of their rights.

The fraud in this case was, indeed, more culpable than that disclosed in *Strang* v. *Bradner*, *supra*.

In that case it appeared "that when Strang applied for the "March notes, defendants knew that they were insolvent, but "the fact was not known to plaintiffs." (*Id.*, 558.)

So here, when Ames practiced this fraud upon the plaintiffs, in order that he might procure and dispose of their property without paying for it, he too, knew that he was insolvent, and such fact was unknown to the plaintiffs or their agents.

VIII.

There was no error in the admission of evidence upon the question of Fraud.

On page 76 of the argument of counsel for the plaintiff in error appears the following:

"The grounds of objection to such evidence, urged at the "trial by Ames' counsel and also in the State Supreme court, "will be found on page 30 of the abstract."

No other exception to this class of evidence is pointed out; and so far as we can ascertain no other exception was taken in the

trial court to the introduction of evidence upon the question of fraud in the creation of the debt, etc.

We understand by reference to "page 30 of the abstract," counsel refer to page 30 of the printed record.

A reference to that page of the printed record, and the pages 31, 32 and 33 next succeeding, containing anything like an exception on the part of the defendant, was to the admission of secondary evidence to show the contents of Exhibits A and B, to Bell's deposition, which appear to have been destroyed in the Chicago fire of 1871. These Exhibits A and B appear in the record at pages 93 and 94, and consist of the Ames drafts and bills of lading before mentioned, all dated July 18, 1870, except one of the bills of lading dated July 19, 1870.

It seems quite unnecessary to enter into an argument to show that these drafts and bills of lading were, under the circumstances shown, competent evidence in the case.

Counsel for the defendant in the trial court, objected to the proof of the testimony of the deceased witnesses, George S. Carmichael and Thomas S. Phillips, taken in the replevin suit between Phillips and Carmichael and the Michigan Central Railroad Company, upon the ground that the parties to this suit were not parties to such former suit; and the court found that such *privity* appeared between these parties on each side of these two suits, respectively, that the testimony of the deceased witnesses might be received "so far as it is germain to the issue here," to which defendant saved an exception. (Printed Rec., 25 to 27.)

The question thus raised did not relate to any federal question, and if it did, the ruling of the State court was clearly proper.

1. The issue involved in the two suits related to the same subject-matter, and the respective parties, plaintiffs and de-

fendants, were in such privity as to render the testimony of witnesses, since deceased, given in the former suit, competent evidence in the suit then pending in the trial court.

Wade v. *King*, 19 Ill., 301, 308.
Goodrich v. *Hanson*, 33 Ill., 498, 507.
1 Greenl. Ev., § 164.
1 Wharton on Ev., § 177.

On the part of the plaintiff in the two suits, Phillips and Carmichael only claimed the right to the possession of the highwines as agents for Robert Moir & Co., and in that capacity brought and prosecuted the suit of replevin.

As to the privity between the defendants the case is equally clear. The Michigan Central Railroad Company, which was the nominal defendant in the replevin suit, was Ames' bailee of the goods for carriage. "The highwines were in the pos-"session of the railroad company, merely as the servant of "Ames."

Mich. Cen. R. R. Co. v. *Phillips*, 60 Ill., 199.

This suit was actually defended by Ames' pledgee, the National Bank of Commerce, with Ames' knowledge and acquiescence, and for his use and benefit; because, if the defense was successful, the proceeds of the wines would have to be applied to the payment of Ames' debt to the bank.

The law is well settled that such relations of privity exist between bailor and bailee, or pledgor and pledgee, that a suit by one against a third party, respecting the subject of the bailment or pledge, bars a suit by the other; and for this reason full damages may be recovered by either the bailor or bailee in such a suit.

Story on Bailments, §§ 94, 352.
Edwards on Bailments, §§ 103, 104.
4 Black Com., 452-3.

C. & N. W. Ry. Co. v. *Schultz*, 55 Ill., 521.
Benjamin v. *Stremple*, 13 Ill., 466.
Freeman on Judgments, § 166.

Such privity having been so established, the testimony of the deceased witnesses relating substantially to the same issue, was clearly competent.

2. But even such ground of objection as may have existed was subsequently waived or obviated.

It is well settled that error in the admission of incompetent evidence is obviated and rendered harmless by the proof of the same facts by competent evidence.

Protection Life Ins. Co. v. *Foote*, 79 Ill., 361.
Trogdon v. *Murphy*, 85 Ill., 120.
Thompson v. *McLaughlin*, 66 Ill., 407.
Schultz v. *LePage*, 21 Ill., 160.
Kreigh v. *Sherman*, 105 Ill., 49.

The record shows that at the instance of defendant's counsel, with the consent of the plaintiffs in the trial court, the testimony of the same witnesses, George S. Carmichael and Thomas S. Phillips, taken in the case of *Robert Moir et al.* v. *Phillips & Carmichael*, was read in evidence, wherein they testified to the same facts which had been read from their testimony in the replevin suit. (Printed Rec., 151 to 165.)

The testimony thus received by consent of the parties, and without exception or objection on either side, embraced the same matters relating to the issues under the pleas of discharge in bankruptcy, which were contained in the testimony of Carmichael and Phillips in the replevin suit. There is clearly no available error appearing in the record on that question, for review in this court.

IX.

There is no Error in the Instructions.

The instructions which were given appear in the printed record at pages 165–167, 172. A reference thereto will show that the defendant, in the trial court, certainly has no right to complain that the law was not given to the jury as favorably for him as he had the right to ask. The jury were explicitly instructed that the discharge in bankruptcy was a complete defense, unless the plaintiffs proved that the "alleged debt sued "upon was created by the fraud of the defendant, and that "that such fraud means positive fraud, or fraud in fact, involv-"ing moral turpitude or intentional wrong, and not implied "fraud, or fraud in law, which may exist without the imputa-"tion of bad faith or immorality;" and that the burden of proof to show such actual fraud rested upon the plaintiffs. (*Id.*, 167.)

This was the vital issue in the case. Upon every other question there was either no proof whatever to support the defense, or else the facts were undisputed on the trial, as the record will show. (*Id.*, 15–18.)

It may be somewhat tiresome to examine all the instructions *seriatim;* we shall, therefore, endeavor to group such of them as relate to the discharge in bankruptcy into classes, and submit such suggestions as seem pertinent.

1. *As to the plaintiffs' instructions in the trial court.*

The contract sued upon and proven was in writing. It was not competent to vary its terms by parol, and the court properly construed the same as a sale for cash, and not upon credit.

The court had the right to define the class of fraud in the

creation of the debt which would obviate a discharge in bankruptcy, *i. e.*, whether mere fraud in law would be sufficient, or whether it should be actual or positive fraud, involving moral turpitude or intentional wrong. The court did this in general terms in the instructions given for the defendant. For the same reason, the court, as a question of law, had the right to state to the jury, more specifically, what class of facts would warrant them in finding such *actual fraud* in the creation of the debt, that the same would not be barred by a discharge in bankruptcy. This was the full scope and purpose of the plaintiffs' second and fourth instructions. (*Id.*, 165, 166.)

Stating to the jury, in general terms, that constructive fraud, or fraud in law, would *not*, but that actual or positive fraud would, defeat a discharge in bankruptcy, while correct as a proposition of law, might not be accurately understood by the average juryman. It was proper for the court to so instruct the jury upon this question, that they would understand the law, as applicable to the case then on trial before them.

The question arose, on the trial, whether, in order to bring the case within the exception contained in the discharge in bankruptcy, the defendant must have practiced some fraud to induce the plaintiffs to make the contract, or whether, on the other hand, it would be sufficient to show that the fraud was practiced by the defendant in taking unfair advantage of the temporary deposit of the wines in defendant's storehouse, or in the conditional delivery; and so disposing of the goods, without the knowledge or consent of the plaintiffs, as to wrongfully defeat their vendor's lien, and prevent the exercise of their conceded right to reclaim the goods, and thus prevent the existence of the debt.

The instruction was not so drawn as to assume any of the facts to have been proven in this case. It was drawn in the

form of an abstract statement of the law as to what kind of acts would warrant the jury in finding such fraud to exist as would except a case from the operation of a discharge in bankruptcy. It left all the questions of fact to be found by the jury, and as originally drawn would have been free from any legal objection.

McKean v. *Salem*, 148 Mass., 109, 112, *115*.
Commonwealth v. *Clifford*, 145 Mass., 97.

But through an abundance of caution, the court added thereto the following:

"It is for the jury to say, however, from all the evidence, whether the defendant *in this case was, in fact, guilty of actual fraud* in pledging the property in question without having paid for the same, in the manner shown by the evidence." (Rec., 166.)

2. *As to defendant's given instructions.*

Defendant's given instructions appear on page 167 of the printed record.

The first of the series, so far as it goes, correctly states the law, and, as we have shown (*ante*, pp. 15-16), concedes, that if the defendant had not given the National Bank of Commerce "an outside party, for value without notice of the "seller's rights, an interest therein," the plaintiffs could have reclaimed and retained their highwines.

The second is a very strong statement of the law in favor of defendant, as to the kind of fraud necessary to exist to defeat a discharge in bankruptcy, and correctly informs the jury that the burden rests upon the plaintiffs to prove such fraud.

The third tells the jury that the bankruptcy discharge is a complete defense, "unless the debt sued upon was created "by fraud of the bankrupt, as defined in the other instruc-"tions given to you by the court."

The instruction given by the court, upon its own motion, appears in the printed record at pages 172, 173. After accurately stating such of the pertinent facts as the record shows were conceded by the defendant on the trial, and were not in dispute between the parties, and also stating the contention between the opposing parties, respecting the alleged fraud in the creation of the debt, the instruction concludes thus:

"And it is for you, gentlemen of the jury, from these facts (referring to those which were not in dispute), taken in connection with all the other evidence in the case, to say whether the defendant was actually guilty of fraud, or not.

And upon the question of fraud the court instructs you that fraud, such as will defeat a discharge in bankruptcy, and render a party still liable for an indebtedness, notwithstanding the discharge, must be actual fraud, or fraud involving moral turpitude, bad faith, intentional wrong, on the part of the defendant."

The facts which are referred to by the court in this instruction as undisputed, and for the purpose of the instruction are assumed to be true, were admitted to be true by the counsel for defendant below on the trial in his opening statement to the jury (*id.*, 16–18) and from time to time throughout the trial; and also in the testimony of the defendant Ames when examined as a witness.

It is proper for the court, in its instructions, to assume the existence of facts which, on the trial, appeared not to be in dispute between the parties, although formally put in issue by the pleadings.

Miller v. *Kirby*, 74 Ill., 242.
Hanrahan v. *The People*, 91 Ill., 142.
Martin v. *The People*, 13 Ill., 341.
Davis v. *People*, 114 Ill., 87, 97.
Cook County v. *Harms*, 108 Ill., 153, 163.

And for this reason it was deemed advisable to incorporate

in the bill of exceptions the opening statement of counsel for defendant, made to the jury at the commencement of the trial.

There was clearly no error in the charge of the court.

3. *As to defendant's refused instructions.*

Where a series of instructions are asked in the aggregate, and there is anything exceptionable in either of them, the court may reject the whole series, although some of them, taken separately, may be free from objection.

Ind. & St. L. R. R. Co. v. *Horst*, 93 U. S., 291, 299.

Beaver v. *Taylor*, 93 U. S., 46, 54.

The bill of exceptions shows that the court at the request of the defendant, gave to the jury three instructions (Print. Rec., 167), and then proceeds thus:

"And the defendant, by his counsel, then and there asked "the court to give to the jury the following instructions, to "wit:" (*Id*). And then follows the entire series of defendant's refused instructions, extending from pages 168 to 172 of the record at the conclusion of which, on page 172, is the following statement: "But the court refused to give *these in-* "*structions* to the jury; to which decision of the court in refus- "ing to give the same, *and each of them*, to the jury, the de- "fendant, by his counsel, then and there excepted." (*Id.*, 172.)

So far as the record shows, the only thing the defendant's counsel requested the trial court to do in respect to these refused instructions, was to give the entire series, and the only decision thereon which that court made was a refusal "to give "*these instructions*," or the entire series, as requested by defendant's counsel. It is true, in the exception to this decision of the court, the statement is: "to which decision of the court "in refusing the same, *and each of them*," the counsel excepts,

etc. This exception cannot enlarge or modify the request to give this series of instructions so as to make it apply to each instruction, severally; nor can it change or modify the decision of the court so as to make it a refusal to give any or either of the instructions separately from the series. This was something the court had not been asked to do, and upon which the bill of exceptions fails to show the court made any decision whatever. It follows, therefore, that if any one of the entire series of refused instructions were bad, there was no error in the decision of the court in refusing to give them as requested by defendant's counsel.

Caldwell v. *Murphy*, 11 N. Y., 416.
Jones v. *Osgood*, (2 Seld.), 6 N. Y., 233.
Walsh v. *Kelly*, (1 Hand), 40 N. Y., 556.

It is accordingly held that where a series of propositions are requested and refused by the court, and counsel thereupon "excepted to the said refusal *as to each proposition separately*," and also excepted to the charge as made by the court, *and each and every part thereof*, it was held that such exception raised no question for review on appeal.

Walsh v. *Kelley*, *supra*.
Zabriskie v. *Smith*, 13 N. Y., 323.

Applying these principles to the present record, it will appear that there is no question presented by the bill of exceptions in respect to the defendant's refused instructions, subject to review in this court.

We might dismiss the question raised upon the refusal of the court to give the defendant's instructions, which were refused, upon showing that any one of the series was bad. For example, the very first of this series of refused instructions was properly rejected, because it was thereby proposed to submit

to the jury the proper construction of the written contract as to whether the sale "was, or was not a sale for cash on deliv-"ery." (Printed Rec., 168.) It is unnecessary to rely upon this point, however, because each of the whole series was properly refused.

The learned counsel for plaintiff in error have not seen fit to enter into any discussion of these refused instructions, and therefore we shall forbear doing so. Most of the entire series will show that they were properly refused on grounds bearing no relation to the question of discharge in bankrupty, and upon which no question can arise in this court.

If we are correct in the general proposition maintained in this brief and argument, that in a case of this character the fraud in the performance and carrying out of such an executory contract as that declared upon, may enter into and become a constituent element in the creation of a debt subsequently accruing on such contract, then there is nothing in anywise faulty or erroneous in any of the refused instructions subject to review here.

We submit that as held by the Supreme court of Illinois in this case:

"The debt was not entirely created until Ames induced the "agents of Moir & Co. to place the wines in his possession, "and if he obtained the possession by fraud, with the intent "to ship the goods out of the country, and thus defeat the lien "of the vendors, these were facts from which the jury might "infer fraud within the meaning of the bankrupt law." (Printed Rec., 188.)

Ames v. *Moir et al.*, 130 Ill., 582, 593.

The transaction was not consummated, and the debt sued for did not accrue, until the acts of performance under the con-

tract took place; and at the time, and as a part of that transaction, Ames' fraud was perpetrated.

It was not simply the case of fraud to evade the payment of a debt which had previously accrued on a contract. The fraud perpetrated by Ames was an efficient cause in the creation of the debt, and, therefore, excepted this case from the operation of his discharge in bankruptcy.

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